In the Supreme Court of the United States

OCTOBER TERM, 1934

No. —, ORIGINAL

THE UNITED STATES OF AMERICA, PLAINTIFF

v.

THE STATE OF ARIZONA, DEFENDANT

MOTION FOR LEAVE TO FILE BILL OF COMPLAINT

Comes now the United States, by its Attorney General and its Solicitor General, and asks leave of the Court to file its bill of complaint against the State of Arizona, submitted herewith.

HOMER S. CUMMINGS,
Attorney General.

J. CRAWFORD BIGGS,
Solicitor General.

JANUARY 1935.

106318—35——1

STATEMENT IN SUPPORT OF MOTION

The purpose of this suit is to restrain and perpetually enjoin the defendant, the State of Arizona, from interfering in any manner whatsoever with the construction, operation, and maintenance of Parker Dam and appurtenant works, by the United States, its officers, agents, and employes.

The State of Arizona asserts the right to prevent the construction of Parker Dam without its consent and has interfered and threatens further interference by the use of all means and force at its command to stop and prevent the construction of said dam.

The question of the right of the United States to construct, operate, and maintain said dam is one which should be determined.

J. CRAWFORD BIGGS,
Solicitor General.

JANUARY 1935.

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No. —, ORIGINAL

THE UNITED STATES OF AMERICA, PLAINTIFF

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THE STATE OF ARIZONA, DEFENDANT

BILL OF COMPLAINT

The United States of America, by its Attorney General and its Solicitor General, brings this suit against the State of Arizona and alleges and shows as follows:

I

That on or about September 10, 1934, the United States, acting by and through the Federal Emergency Administrator of Public Works and the Secretary of the Interior, pursuant to and by the authority of the Constitution and laws of the United States and particularly the National Industrial Recovery Act (c. 90, 48 Stat. 195) and the Reclamation Act (c. 1093, 32 Stat. 388) and Acts supplementary thereto, commenced the construc-

tion of Parker Dam, a structure hereinafter described, in the main stream of the Colorado River, for the purposes, as hereinafter more fully set forth, of controlling floods and regulating navigation, of irrigating and reclaiming lands within the Colorado River Indian Reservation and certain public lands of the United States, of protecting Federal property from damage by floods, of reregulating the water discharged at Hoover (Boulder) Dam, in such manner as to enable more effective use of said Boulder Dam, and for other public purposes.

II

That Parker Dam is located about 150 miles southwest of said Boulder Dam, shortly below the confluence of the Bill Williams River and the Colorado River, and about 10 miles north of the northern boundary of the Colorado River Indian Reservation, located in the State of Arizona. The eastern abutment of said Dam rests upon public lands of the United States in the State of Arizona and its western abutment rests upon unsurveyed public lands of the United States in the State of California. Pursuant to certain specifications and drawings of the United States Department of the Interior, Bureau of Reclamation, Parker Dam, when completed, will constitute a concrete and steel structure resting upon bed rock at an elevation of 135 feet above sea level, or about 240 feet below the present bed of the Colorado River, and rising to

elevation 501. By means thereof the river level will be raised above said Dam about 72 feet and will provide a reservoir with storage capacity of approximately 717,000 acre-feet and approximately 20 miles in length. It is so located as to intercept all waters discharged at Boulder Dam as well as the inflow of certain tributaries of the Colorado River below Boulder Dam, particularly the Bill Williams River. The Parker Dam is so designed as to permit, when completed, the generation of electric energy at a rate equivalent to approximately 85,000 continuous horsepower and to permit the release of all waters required for navigation, flood control of the Colorado River, and for the irrigation of lands below said Dam. It is estimated that the capacity of the reservoir which will be created by the construction of said Dam will be adequate for the purpose of and has been designed to impound and control the floods of all tributaries between Boulder Dam and Parker Dam, and to equate to an approximately constant flow the daily fluctuations of discharges of water at Boulder Dam necessitated by power generation.

Parker Dam and Reservoir are so located and designed both as to reservoir capacity and outlet works as to be operated in synchronization with Boulder Dam so that Parker Dam will:

1. Reregulate and equate, in aid of navigation and river regulation, the waters discharged at Boulder Dam in response to requirements of flood

control and fluctuating power and irrigation demands;

2. Permit the discharge of water for generation of power at Boulder Dam which otherwise would be required to be retained in storage for river regulation, improvement of navigation, flood control, irrigation, and domestic uses;

3. Permit the conservation for irrigation and domestic uses and satisfaction of present perfected rights of waters required to be discharged at Boulder Dam for improvement of navigation, river and flood control, and power generation.

III

That said Parker Dam Project has heretofore been duly included by the Federal Emergency Administrator of Public Works in the comprehensive program of public works referred to and authorized by Section 202, Title II, of the National Industrial Recovery Act (48 Stat. 195) by which Congress provided for the construction, financing, or aid in the construction or financing, of river and harbor improvements.

IV

That as provided by said Act and pursuant thereto the Chief of Engineers of the United States Army has recommended the construction of said Parker Dam Project and said recommendation has received the approval of the Secretary of War.

V

That the Colorado River is a navigable interstate stream flowing between the States of Arizona and California and emptying into the Gulf of California and forms the boundary between said States for a distance of approximately two hundred and thirty-seven miles. That said Bill Williams River rises in Arizona, flows 132 miles therein, and enters the Colorado River approximately one-half mile above said Parker Dam. The flow of said Bill Williams River ranges from 9 cubic feet per second to over 50,000 cubic feet per second. It is subject to flash floods of short duration but heavy volume, which are a constant menace to the lands of the Colorado River Indian Reservation and public lands of the United States in Arizona and California as well as to the navigation of the Colorado River below the site of the Parker Dam.

VI

That the United States is required by the provisions of the Boulder Canyon Project Act (45 Stat. 1057) to utilize Boulder Dam, first, for river regulation, improvement of navigation, and flood control; second, for irrigation and domestic uses and satisfaction of present perfected rights in pursuance of Article VIII of the Colorado River Compact; and third, for the generation of power.

VII

That the Secretary of the Interior has heretofore, pursuant to Sections 4 and 5 of said Act and general regulations promulgated by him on April 25, 1930, amended March 10, 1931, July 1, 1931, and November 16, 1931, entered into contracts for the generation and sale of electric energy at Boulder Dam, upon which the United States is dependent for the amortization of the cost of said Dam and appurtenant works.

VIII

That the construction of the Boulder Dam and the Parker Dam pertain to the same general public purposes as expressed by the Congress in enacting legislation for the regulation, control, and improvement of the Colorado River System, including the regulation of the Colorado River respecting navigation.

IX

Parker Dam is located about 10 miles above the northern boundary of the Colorado River Indian Reservation, and is so designed, as to structure, reservoir capacity, outlet works, and power plant, as to promote the reclamation and irrigation of lands within said reservation, now largely arid, and of public lands of the United States. The lands within said reservation, and said public lands, were acquired by the United States from Mexico under the Treaty of Guadelupe Hidalgo, February 2,

1848 (9 Stat. 922). Said reservation was established by the Act of Congress of March 3, 1865 (c. 127, 13 Stat. 541, 559), and at the date of said statute embraced about 75,000 acres riparian to the Colorado River in Arizona. Said reservation was enlarged by Executive Orders of November 22, 1873, November 16, 1874, May 15, 1876, and November 22, 1915, and now embraces an area of about 232,990 acres, of which 150,000 acres riparian to the Colorado River are irrigable. By the Act of March 2, 1867 (c. 173, 14 Stat. 492, 514), the Congress appropriated $50,000 for the purpose of constructing diversion and irrigation works for said reservation, and by the Act of July 27, 1868 (c. 248, 15 Stat. 198, 222), an additional $50,000 was appropriated for like purposes. That at various times since said last-named date Congress has appropriated further and additional amounts for similar purposes. That the total appropriations made by Congress for said purposes exceed $1,359,000. On January 31, 1903, the Secretary of the Interior withdrew, pursuant to Section 3 of the Reclamation Act (c. 1093, 32 Stat. 388), all lands in Arizona lying within six miles of the Colorado River west of the 114th meridian. Said area so withdrawn includes, among other areas, the site of Parker Dam, and all lands between Parker Dam and the Colorado River Indian Reservation within six miles of the Colorado River. By the Act of April 21, 1904 (c. 1402, 33 Stat. 189, 224), the Congress authorized the Secre-

tary of the Interior to divert the waters of the Colorado River and to reclaim, utilize, and dispose of any land in said reservation which might be made irrigable by works constructed under the Reclamation Act. By the Act of April 4, 1910 (c. 140, 36 Stat. 269, 273), the Congress appropriated $50,000 for the purpose of securing an appropriation of water for the Colorado River Indian Reservation. By the Act of June 20, 1910 (c. 310, 36 Stat. 557, 570), the Congress authorized the admission of Arizona as a State, providing therein, among other things:

> Seventh. That there be and are reserved to the United States, with full acquiescence of the State, all rights and powers for the carrying out of the provisions by the United States of the Act of Congress entitled "An Act appropriating the receipts from the sale and disposal of public lands in certain States and Territories to the construction of irrigation works for the reclamation of arid lands", approved June seventeenth, nineteen hundred and two, and Acts amendatory thereof or supplementary thereto, to the same extent as if said State had remained a territory.

By the Act of December 21, 1928 (c. 42, 45 Stat. 1057), the Congress ratified the Colorado River Compact (Article VII whereof provides that nothing in said compact shall be construed as affecting the obligations of the United States of America to Indian tribes), authorized the construction of

Boulder Dam and authorized the appropriation of moneys for surveys of the Parker-Gila Valley reclamation project embracing the said Colorado River Indian Reservation and certain public lands of the United States. Approximately 150,000 acres of the lands within the Colorado River Indian Reservation are irrigable, but require pumping of waters of the Colorado River or diversion of said waters by a dam and canal, for such purposes. There are, in addition, below Parker Dam several hundred thousand acres of public lands of the United States lying along and near the Colorado River, irrigable by the waters of said river in like manner. Parker Dam is so designed as to generate the equivalent of about 85,000 continuous horsepower of electric energy, of which, as hereinafter set forth, the United States has reserved at least one-half for use in pumping waters of the Colorado River for irrigation of said Indian and public lands. The electric power privilege so reserved is sufficient to enable the reclamation of all lands within said reservation at a cost less than is feasible by any other method. In addition, said dam is so designed as to enable the diversion of waters of the Colorado River thereat by means of a canal at an elevation sufficient to irrigate all of said reservation and large areas of public lands.

X

For the purpose of carrying out the provisions of the Acts of Congress authorizing the construc-

tion of the Parker Dam in the bed of the Colorado River at the place hereinbefore set out, and pursuant to the paramount constitutional powers of the United States, a contract was made and entered into on February 10, 1933, between the United States, acting by and through the Secretary of the Interior, and the Metropolitan Water District of Southern California, a public corporation organized and existing under and by virtue of the laws of California. This contract, among other things, provides that the District shall advance to the United States from time to time sums not to exceed $13,000,000, and the United States shall construct by means of such funds, pursuant to the provisions of the Reclamation Act (c. 1093, 32 Stat. 388), and Acts supplemental thereto, particularly the Act of March 4, 1921 (c. 161, 41 Stat. 1367, 1404), the Act of April 21, 1904 (c. 1402, 33 Stat. 189, 224), and the Act of December 1, 1928 (c. 42, 45 Stat. 1057), the project referred to therein and in this bill of complaint as Parker Dam, for the purposes of controlling floods of the Colorado River and its tributaries below Hoover (Boulder) Dam, improving and regulating navigation, providing for the protection and reclamation of the lands within the Colorado River Indian Reservation in Arizona and public lands of the United States in Arizona, and for the re-regulation of the waters discharged in the operation of Hoover (Boulder) Dam, required by the provisions of the

Boulder Canyon Project Act (c. 42, 45 Stat. 1057). By said contract the United States has reserved the right to control all waters passing said Parker Dam when constructed; the right, without contribution by the United States to the cost of the Dam, to one-half the power privilege created thereby for use in the irrigation and drainage of lands in Arizona within the Colorado River Indian Reservation as now constituted and the Gila or Parker-Gila Project; the right to have power transmitted over lines of the Metropolitan Water District of Southern California from Hoover (Boulder) Dam to the Parker Dam at cost for use in the Colorado River Indian Reservation and the Gila or Parker-Gila Project; the right to connect the Parker Dam and/or reservoir created thereby, by means of a canal, including such outlet and diversion features as may be necessary or advisable, with lands within the Colorado River Indian Reservation as now constituted and with public or other lands in Arizona or California; and the right to divert such quantities of water as may be consistent with the Colorado River Compact and the said Boulder Canyon Project Act.

Said contract further provides that the Metropolitan Water District of Southern California shall be entitled to certain rights, including one-half the power privilege created by the proposed Parker Dam, and the right to divert water from said dam and/or the reservoir created thereby in

such quantities as may be consistent with the Boulder Canyon Project Act, the Colorado River Compact, and certain contracts previously entered into between the United States and said District pursuant to the provisions of the said Boulder Canyon Project Act.

The contract further provides that the United States shall operate and maintain said reservoir, dam, and outlet works, and that title to the dam and other structures related thereto shall remain in the United States.

The contract further provides that as far as practicable the works comprising the Parker Dam shall be constructed co-incidentally with the construction of Hoover (Boulder) Dam and the filling of the reservoir created by the erection of said last-named dam.

XI

It is essential that the excavation for the foundation of Parker Dam to the depth of 240 feet below the present bed of the Colorado River be completed and that all subwater work on said structure be constructed and finished during the period in which Hoover (Boulder) Dam is under construction and before the operation of said Hoover (Boulder) Dam, as required by the Boulder Canyon Project Act, necessitates large discharges of water from its impounding reservoir; otherwise the feasibility and cost of construction will be seriously and adversely affected.

XII

That after construction work on the Parker Dam had been commenced by the United States, and while construction work was in progress, pursuant to its contract with the Metropolitan Water District of Southern California, and, to wit, on or about November 7, 1934, the defendant, the State of Arizona, acting by and through her Governor, wrongfully and without warrant of law and in contravention of the sovereign rights and powers of the United States, threatened to prevent and did in fact prevent the construction of the work already commenced in relation to the erection of said Parker Dam; that on said date the Governor of the State of Arizona by wire advised the Secretary of the Interior of the United States and the engineer in charge of the construction of Parker Dam that the construction work then in progress, to wit, the Parker Dam could not lawfully go forward without the consent of the State of Arizona and that said State had not consented thereto; that the State of Arizona would not so consent until her rights in the waters of the Colorado River had been satisfactorily settled, and that in the event the work of constructing Parker Dam should be prosecuted to a point "where a trespass upon Arizona's rights is involved, it will be my duty as Governor of Arizona to use all means and force at my command to stop and prevent such work and to repel any invasion of Arizona's rights."

Following the transmission of said wire, the Governor of the State of Arizona, on November 10, 1934, issued an order proclaiming martial law in the area immediately adjacent to the Parker Dam location on the Arizona side of the Colorado River.

Following the order of the Governor of the State of Arizona, by which the said Governor undertook to establish martial law, the State Militia was dispatched to the vicinity of the Parker Dam site for the avowed purpose of preventing further operations by the United States pursuant to its contract hereinbefore mentioned. That notwithstanding that no rights or authority of the State of Arizona were or could be jeopardized or adversely affected by the construction of said Parker Dam, the defendant, the State of Arizona, and its Governor arbitrarily, wrongfully, and unlawfully sought to oppose and did in fact oppose and prevent the United States from proceeding with the construction of the public improvement above mentioned, and against the supreme and paramount power and authority of the United States as expressed by the Federal Constitution and Acts of Congress pursuant thereto. Although the officers of the United States in charge of the administration and construction of the Parker Dam Project had the right to rely confidently upon the constitutional and statutory powers of the United States to proceed with the further construction of said project and complete the same, it was resolved in the interest of peace and tran-

quillity, and to prevent armed conflict, to suspend further operations, and to submit to the decision of this Court the rights of the United States to construct said Parker Dam and to proceed to the completion thereof under the terms of its contract with the Metropolitan Water District of Southern California. That unless the defendant, the State of Arizona, its officers and agents, are prevented from interfering with the construction and erection of said Parker Dam the constitutional power and authority of the United States in respect of the control of navigable rivers in aid of navigation and the use thereof in the creation of public works for the material advantage and benefit of the public will thereby be defeated and set at naught.

XIII

Plaintiff has no plain, speedy, and adequate remedy at law and unless the defendant, the State of Arizona, and its officers, representatives, and agents are restrained and enjoined from interfering with the construction of said Parker Dam great and irrevocable damage and injury to the United States, the plaintiff herein, will result.

WHEREFORE, the plaintiff, the United States of America, prays:

(*a*) That the defendant, the State of Arizona, be required to appear and answer this bill of complaint and therein to specifically set forth the nature and extent of its asserted right to interfere

with the construction by the United States of said Parker Dam.

(*b*) That any and every such asserted claim of right be adjudged and decreed to be null and void.

(*c*) That all interference and threatened interference by the State of Arizona, its officers, agents, and employees, with the construction of Parker Dam be restrained pending the final determination of this action.

(*d*) That the defendant, the State of Arizona, its officers, agents, and employees, be forever enjoined from interfering in any manner whatsoever with the construction, operation, and maintenance of Parker Dam and appurtenant works by the United States, its officers, agents, and employees.

(*e*) That the plaintiff, the United States of America, have such other and further relief as it may be entitled to in equity and good conscience.

HOMER S. CUMMINGS,
Attorney General.

J. CRAWFORD BIGGS,
Solicitor General.

JANUARY 1935.

U. S. GOVERNMENT PRINTING OFFICE: 1935

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1934

No. 18, Original

UNITED STATES OF AMERICA, Plaintiff,

vs.

STATE OF ARIZONA, Defendant.

RETURN TO RULE TO SHOW CAUSE WHY RESTRAINING ORDER SHOULD NOT ISSUE

In answer to the Rule of this Honorable Court in the above entitled matter directing the defendant to be and appear before it on Monday, February 4, 1935, then and there to show cause, if any it has, why a restraining order should not issue against it as set forth in said rule, the defendant:

1. Files, bound herewith, affidavit of Honorable B. B. Moeur, Governor of the State of Arizona, in which are set forth reasons of defendant for forcibly preventing construction of Parker Dam in the bed of the Colorado River lying east of the thread of the stream.

2. Moves that the Bill of Complaint be dismissed upon the following grounds:

(a) That the facts alleged therein are insufficient to constitute a valid cause of action in equity against the defendant.

(b) That it affirmatively appears upon the face thereof that the United States is not the real party in interest.

(c) That it affirmatively appears upon the face thereof that the Metropolitan Water District of Southern California, a corporation organized under the laws of the State of California, is the real party in interest.

Defendant has filed and bound herewith a brief and argument supporting points advanced in opposition to granting restraining order.

In order that a speedy determination of this controversy may be had, defendant tenders the following stipulation, which, if agreeable to the Court and accepted by the plaintiff, shall be binding upon the parties:

"The United States declares that the plans for Parker Dam make no provision for, nor does the plaintiff intend to provide, facilities by way of locks or otherwise for the convenient passage of commerce by navigation through or around said dam.

The Court may decide this cause on the merits and enter final decree on the Bill, defendant's return to rule to show cause why restraining order should not issue, including motion to dismiss, and affidavits fil-

ed by the parties in support of and in opposition to application for restraining order.

This stipulation is without prejudice to the right of either party to urge any point of law.

This cause may be advanced for argument and set for any day subsequent to the 15th of February, 1935."

JOHN L. SULLIVAN,
Attorney General of Arizona.

JAMES R. MOORE,
Special Assistant Attorney General.
Solicitors for Defendant.

HERMAN LEWKOWITZ
Of Counsel.
February, 1935.

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1934

No. 18, Original

UNITED STATES OF AMERICA,
Plaintiff,

vs.

STATE OF ARIZONA,
Defendant.

AFFIDAVIT OF B. B. MOEUR, GOVERNOR OF ARIZONA, IN OPPOSITION TO THE APPLICATION FOR RESTRAINING ORDER

STATE OF ARIZONA
County of Maricopa } ss.

B. B. MOEUR being first duly sworn, deposes and says:

I am and at all times since January, 1933, have been the duly elected, qualified and acting Governor of the State of Arizona and make this affidavit for and on behalf of the State of Arizona as defendant in the above entitled cause.

I am advised and believe and, therefore, state the proposed Parker Dam, mentioned in the Bill of Complaint and affidavits herein, is attempted to be constructed by the Honorable Secretary of the Interior of the United States pursuant to an agreement heretofore entered into between the United States and the Metropolitan Water District of Southern California under date of February 10, 1933, commonly referred to as "The Co-operative Contract for Construction and Operation of Parker Dam", under which the United States of America, acting through its then Honorable Secretary of the Interior, undertook to build said dam at the cost of said District, the necessary funds for the construction thereof to be advanced by said District to the United States as might be required.

I am advised and believe that said contract of February 10, 1933, was and is wholly unauthorized by law and was entered into between the then Secretary of the Interior without any authority or warrant of law whatsoever.

I am advised and believe that in attempting to construct said Parker Dam, the Secretary of the Interior is acting as Contractor for the Metropolitan Water District of Southern California.

I am further informed and believe that the State of Arizona as a sovereign State of the United States has sovereign and property rights in the bed, banks and waters of the Colorado River and as trustee for its people is under a legal duty to protect such rights,

and that the State of Arizona as such sovereign owns the bed, banks and waters of the Colorado River and has a duty to maintain the navigability of said stream. That the only duty, authority or jurisdiction of the United States, or its officers, over the Colorado River at the site of the proposed Dam is to regulate it or improve it in aid of navigation. That the proposed Parker Dam is not in aid of navigation, but destructive thereof and if constructed will completely block navigation on said stream at said point.

I am informed and believe that if the Colorado River is to be abandoned as a navigable stream, that sole jurisdiction thereover will revert to the States in which it flows; that so long as it remains a navigable stream the joint consent of the United States, expressed through an act of Congress, and of the State of Arizona, expressed through an act of its Legislature, is necessary for the authorization of the construction of an obstruction to the navigability thereof by or for the Metropolitan Water District of Southern California, or anyone else.

I am informed and believe that the construction of the Parker Dam has not been authorized by the Congress of the United States. Such construction has not been authorized by the Legislature of the State of Arizona.

I deny that the State of Arizona has made any effort to prevent the development of the Colorado River basin, but I admit that the State of Arizona pursuant to legal advice in the case of *Arizona v. California*,

283 U. S. 423, opposed and questioned the legal authorization of Boulder Dam.

The State of Arizona has at all times been anxious to co-operate with the United States and the other States of the Colorado River basin in the development of the Colorado River along lines which would make provision for proper development and use within the State of Arizona, as well as the other States of the basin, of the waters of the stream.

In this connection I state that in Section 4 of the Boulder Canyon Project Act (45 Stat. 1057) Congress authorized the states of California, Arizona and Nevada to enter into an agreement which should provide:

(1) that of the 7,500,000 acre-feet annually apportioned to the lower basin by paragraph (a) of Article III of the Colorado River compact, there shall be apportioned to the State of Nevada 300,000 acre-feet and to the State of Arizona 2,800,000 acre-feet for exclusive beneficial consumptive use in perpetuity,

(2) that the State of Arizona may annually use one-half of the excess or surplus waters unapportioned by the Colorado River compact,

(3) that the State of Arizona shall have the exclusive beneficial consumptive use of the Gila River and its tributaries within the boundaries of said State,

(4) that the waters of the Gila River and its

tributaries, except return flow after the same enters the Colorado River, shall never be subject to any diminution whatever by any allowance of water which may be made by treaty or otherwise to the United States of Mexico but if, as provided in paragraph (c) of Article III of the Colorado River compact, it shall become necessary to supply water to the United States of Mexico from waters over and above the quantities which are surplus as defined by said compact, then the State of California shall and will mutually agree with the State of Arizona to supply, out of the main stream of the Colorado River, one-half of any deficiency which must be supplied to Mexico by the lower basin,

(5) that the State of California shall and will further mutually agree with the States of Arizona and Nevada that none of said three States shall withhold water and none shall require the delivery of water, which can not reasonably be applied to domestic and agricultural uses,

(6) that all of the provisions of said tri-State agreement shall be subject in all particulars to the provisions of the Colorado River compact; and

that said agreement should take effect upon the ratification of the Colorado River compact by Arizona, California and Nevada.

I further state that Arizona, acting by and through its Colorado River Commission of which I, as Governor of Arizona, am an ex-officio member, has tender-

ed to California and Nevada an offer to enter into a compact with said states strictly pursuant to said provisions of the Boulder Canyon Project Act and to submit said compact, together with the Colorado River Compact, to the legislature of Arizona for ratification; and that the states of California and Nevada have declined and refused said tender and to enter into said compact with the state of Arizona.

Pending the negotiation of the proposed contract between the United States and the State of Arizona, mentioned in the affidavit of the Honorable Secretary of the Interior, filed herein, no work should be undertaken upon the Arizona side of the Colorado River in the construction of said Dam.

I further state that there is at present no duly authorized United States reclamation project in the State of Arizona for the irrigation of which the construction of Parker Dam would be advantageous to the United States, and I am advised and believe that the real purpose of said dam is to afford a reservoir for the desilting of the water of the Colorado River and for the diversion of the water so desilted into the Los Angeles Aqueduct for transmission to the Pacific Coast for municipal and domestic uses of various cities and towns, and I am advised that the Secretary of the Interior has no power or authority under the laws of Congress to construct Parker Dam for that purpose.

I am further advised that under the provisions of the Boulder Canyon Project Act California is restrict-

ed to the use of 4,400,000 acre-feet of water allocated to the lower basin states by Paragraph (a) of Article III of the Colorado River Compact and to one-half of the surplus waters of said stream; that notwithstanding the provisions of the Boulder Canyon Project Act, I am advised and believe that the Secretary of the Interior has entered into contracts with the state of California for the delivery to said state of 5,362,000 acre-feet of water from the Boulder Reservoir, which is 962,000 acre-feet more than authorized and permitted under the provisions of said Act.

Arizona tendered to the Secretary of the Interior a contract by the terms of which, if executed, there would be reserved to the state of Arizona 2,800,000 acre-feet of water stored in Boulder Reservoir for use in Arizona, and I am advised and upon such advice state, that under the provisions of said Boulder Canyon Project Act Arizona is entitled to have reserved for its use said quantity of water. That the Secretary of the Interior declined to enter into said contract for the reason that it was not acceptable to the other states within the Colorado River Basin, notwithstanding said Act does not require said Secretary, as a condition precedent to entering into contracts for the delivery of water from Boulder Reservoir, that the consent of said states be first obtained.

Being advised that steps were being taken by the Honorable Secretary of the Interior to commence work upon said Dam upon the Arizona side of the River, pending said negotiations, and being advised that said Parker Dam might not legally be placed in

the Colorado River without the consent of Arizona, and being further advised that as Governor of the State of Arizona I had the legal right to do so and was under a legal duty to protect the sovereignty and property right of the State of Arizona from such threatened trespass, as Governor of said State I did, as stated in the affidavit of the Honorable Secretary, proclaim martial law and seek to prevent said threatened trespass.

I was further advised that no provision is planned to be made for the passage of boats at said Dam or through or under the bridge which I am advised is intended to be built there, and that such construction will destroy the navigability of said River so long as said bridge or Dam remains therein.

I disclaim any purpose or attempt on the part of Arizona or of myself as Governor or otherwise to coerce the Honorable Secretary of the Interior into executing the proposed water delivery contract mentioned in his affidavit. I was and am advised and believe that Arizona is legally entitled to the use of the waters mentioned in said proposed contract.

I feel it my duty as Governor of Arizona to oppose and if possible prevent the proposed construction of the Parker Dam by and for the Metropolitan Water District of Southern California, unless and until its construction has been consented to by the State of Arizona.

In addition to the obstruction and destruction of

the navigability of said stream by the construction of said Dam, it is being built for the express purpose of permitting the Metropolitan Water District of Southern California to divert therefrom in excess of one million acre-feet of water per annum and carry the same to the coastal plain of California, out of the water shed of said stream so that the navigability of said stream would be thereby further impaired.

I am advised that by the terms of Article VI of the Treaty of Guadalupe Hidalgo the United States and its citizens have the right of free navigation of the Colorado River from the point where said river intersects the boundary between the United States and the United Mexican States to the Gulf of Lower California.

It appears from a report of the United States Department of Interior, Bureau of Reclamation, on the "Stream Flow of the Colorado River and its Tributaries", dated December, 1934, that the virgin flow of the Colorado River at the site of Boulder Dam over a period of thirty-seven years from 1897 to 1934 is 16,600,000 acre-feet.

That quantity of water converted into its equivalent in second-feet will provide a constant flow through Boulder Dam, for the regulation of the River and the improvement of navigation pursuant to the provisions of the Boulder Canyon Project Act, of approximately 25,000 second-feet, and provide a water highway capable of being navigated by the average size ocean-going freighters between Boulder Dam and the

Gulf of Lower California. This would give an outlet to the sea for Arizona cotton, copper (much of which is now trucked to ports at San Diego and Los Angeles for transshipment) timber and other products. The outlet to the sea thus provided would connect with transcontinental railroads at Needles, California, and Yuma, Arizona.

I am further advised that one of the considerations which the United States is to receive under the terms of its contract with the Metropolitan Water District of Southern California is the free use of 42,000 continuous hydro-electric power, which I am advised by electrical engineers of high standing, has a minimum switchboard value at Parker Dam of two mills per kilowatt hour, which, if capitalized, on the basis of five per cent return, is worth from twelve to seventeen millions dollars.

If the navigability of said stream is to be thus entirely destroyed, it is only equitable and fair that the State of Arizona and its citizens should receive from said stream some benefit for the surrender by the State of Arizona of its sovereign and property rights in said navigable stream and the advantages of an improved water highway to the sea.

Contrary to the statement made by the Honorable Secretary of the Interior in his said affidavit, I am advised and believe that construction of the Parker Dam and said proposed diversion of water to said Metropolitan Water District of Southern California will, if permitted, seriously jeopardize and directly

affect the rights of the State of Arizona in the waters of the Colorado River. I am advised and believe and, therefore, state that the rights and property of the State of Arizona and of its residents and citizens will be seriously and adversely affected by construction of Parker Dam.

A temporary injunction, should one be issued herein, will permit an invasion of the sovereignity and property rights of the State of Arizona by and for the Metropolitan Water District of Southern California, and will amount to the taking of property without due process of law.

While it is alleged in Paragraph IV of the Bill of Complaint that the Chief of Engineers of the United States Army has recommended the construction of said Parker Dam Project and said recommendation has received the approval of the Secretary of War, I am informed (said information being contained in a telegram from the Honorable Henry F. Ashurst, Senior United States Senator from the State of Arizona) and believe that the Chief of Engineers did not approve said project until January 4th, 1935, and that the Secretary of War did not approve it until January 5th, 1935, approximately two months after I, acting as Governor of the State of Arizona, declared martial law in the territory immediately adjacent to the site of the proposed Parker Dam and Reservoir and stopped construction of said Dam.

I further state that the Attorney General of Arizona has been advised by the Honorable Henry F.

Ashurst that Parker Dam was not included within the program of public works, which the Administrator of Public Works is authorized to undertake by section 202 of the National Industrial Recovery Act, until December 28th, 1933, some ten months after the date of the Metropolitan Water District contract pleaded in the Bill of Complaint.

I am advised that under the provisions of the Boulder Canyon Project Act, the Secretary of the Interior was authorized to construct only two dams across the bed of the Colorado River, one of which is the so-called Hoover or Boulder Dam. That the other dam that the Secretary of the Interior has been authorized to construct under the provisions of said Act, is that described in Section 1 of the Boulder Canyon Project Act as follows:

> "The Secretary of the Interior, subject to the terms of the Colorado River Compact hereinafter mentioned, is authorized to construct, operate and maintain . . . a main canal and appurtenant structures located entirely within the United States connecting the Laguna Dam, *or other suitable diversion dam, which the Secretary of the Interior is hereby authorized to construct if deemed necessary or advisable by him upon engineering or economic considerations, with the Imperial and Coachella Valleys in California.*" (Italics supplied).

The Laguna Dam mentioned in said Act is located downstream approximately seventy-five miles from the site of the Parker Dam and I am informed and

believe and upon such information state that the Secretary of the Interior has selected a point about five miles upstream from said Laguna Dam, or approximately seventy miles downstream from the Parker damsite, as the site at which he proposes to construct a diversion dam across the Colorado River for connecting said River with the main canal located entirely within the United States, which the said Boulder Canyon Project Act authorized the Secretary of the Interior to construct for the irrigation of the Imperial and Coachella Valleys in California.

I am further advised and upon such advice state that it is not the purpose of the Secretary of the Interior to use said Parker Dam for the purpose of connection with, or diverting water into, the so-called All American Canal, authorized as aforesaid to be built for the irrigation of said Valleys in California, and that said Parker Dam is another and different dam than that contemplated by Congress and which the Secretary of the Interior was authorized to build as a diversion dam in lieu of the existing Laguna Dam mentioned in said Act.

That, whereas the Boulder Canyon Project Act authorizes the Secretary to construct two dams across the Colorado River, he is proceeding to construct three, and the Parker Dam is not one of the two authorized.

I further state that the Colorado River at the site of the proposed Parker Dam and the reservoir to be created thereby was navigable in its ordinary condition and susceptible of being used in the customary

modes of trade and travel on water at and prior to the time Arizona was admitted to the Union as a State and has been at all times subsequent thereto.

IN WITNESS WHEREOF, I have hereunto set my hand this 30th day of January, 1935.

B. B. MOEUR

Subscribed and sworn to before me this 30th day of January, A. D. 1935.

ETHEL McMURCHIE,
Notary Public.

My commission expires January 21, 1936.
(Notarial Seal)

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SUPPORTING BRIEF

STATUTES INVOLVED

The federal statutes involved in this proceeding are:

The National Industrial Recovery Act (c 90, 48 Stat. 195) and particularly section 202 of said Act, the pertinent provisions of which are as follows:

> "The Administrator (the Federal Emergency Administrator of Public Works), under the direction of the President, shall prepare a comprehensive program of public works, which shall include, among other things, the following . . . (b) . . . construction of river and harbor improvements and flood control . . . *Provided*, That no river or harbor improvements shall be carried out unless they shall have heretofore or hereafter been adopted by the Congress or are recommended by the Chief of Engineers of the United States Army."

The Reclamation Act (c. 1093, 32 Stat. 388), and acts supplementary thereto, and particularly Section 2 of the Act of February 21, 1911 (c. 141, 36 Stat. 926), reading:

> "In carrying out the provisions of the reclamation law the Secretary of the Interior is authorized, upon such terms as may be agreed upon, to cooperate with irrigation districts, water-users' associations, corporations, entrymen or water-users, for the construction or use of such reser-

voirs, canals, or ditches as may be advantageously used by the Government and irrigation districts, water-users' associations, corporations, entrymen or water users for impounding, delivering and carrying water for irrigation purposes; *Provided*, That the title to and management of the works so constructed shall be subject to the provisions of section 6 of the Act of June 17, 1902 (c. 1093, 32 Stat. 389) which provides: 'When the payments required by this chapter are made for the major portion of the lands irrigated from the waters of any of the works herein provided for, then the management and operation of such irrigation works shall pass to the owners of the lands irrigated thereby, to be maintained at their expense under such form of organization and under such rules and regulations as may be acceptable to the Secretary of the Interior: *Provided*, That the title to and the management and operation of the reservoirs and the works necessary for their protection and operation shall remain in the Government until otherwise provided by Congress'."

Section 4 of the Act of June 25, 1910 (c. 407, 36 Stat. 836) reading:

"No irrigation project shall be begun unless and until the same shall have been recommended by the Secretary of the Interior and approved by the direct order of the President of the United States."

Section 9 of the Rivers and Harbors Appropria-

tion Act of 1899 (c. 425, 30 Stat. 1151) and Section 12 of said Act as amended by Section 2 of the Act of February 20, 1900 (c. 23, 31 Stat. 32), which we quote:

"Sec. 9. It shall not be lawful to construct or commence the construction of any bridge, dam, dike, or causeway over or in any port, roadstead, haven, harbor, canal, navigable river, or other navigable water of the United States until the consent of Congress to the building of such structures shall have been obtained and until the plans for the same shall have been submitted to and approved by the Chief of Engineers and the Secretary of War . . ."

"Sec. 12. Every person and every corporation that shall violate any of the provisions of sections 401, 403 and 404 of this chapter or any rule or regulation made by the Secretary of War in pursuance of the provisions of the said sections, shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by a fine not exceeding $2,500 nor less than $500, or by imprisonment (in the case of a natural person) not exceeding one year, or by both such punishments, in the discretion of the court. And further, the removal of any structures or parts of structures erected in violation of the provisions of the said sections may be enforced by the injunction of any district court exercising jurisdiction in any district in which such structures may exist, and proper proceedings to this end may be instituted under the direction of the Attorney General of the United States."

Paragraph 7 of Section 20 of the Act of June 20, 1910 (c. 310, 36 Stat. 557, 570) being the Enabling Act authorizing the admission of Arizona as a state and which reads as follows:

> "Seventh. That there be and are reserved to the United States, with full acquiescence of the State, all rights and powers for the carrying out of the provisions by the United States of the Act of Congress entitled 'An Act appropriating the receipts from the sale and disposal of public lands in certain States and Territories to the construction of irrigation works for the reclamation of arid lands', approved June seventeenth, nineteen hundred and two, and Acts amendatory thereof or Supplementary thereto, to the same extent as if said State had remained a territory."

STATEMENT OF CASE

This is a suit in equity of original jurisdiction in this court whereby the United States seeks to enjoin the State of Arizona from interfering with the construction by the United States of the Parker Dam across the Colorado River, a navigable stream, at a point about one hundred and fifty miles down stream from Boulder Dam.

The Bill alleges that on September 10th, 1934, the United States, acting by and through the Federal Emergency Administrator of Public Works and the

Secretary of the Interior, commenced the construction of Parker Dam in the main stream of the Colorado River at the point above designated (Bill Par. I), pursuant to "the Acts of Congress authorizing the construction of the Parker Dam in the bed of the Colorado River at the place hereinafter set out" and pursuant to a contract dated February 10th, 1933, between the United States, "acting by and through the Secretary of the Interior" and the Metropolitan Water District of Southern California, a California public corporation, under the terms of which the District agreed to advance to the United States not exceeding thirteen million dollars with which the United States obligated itself to construct, without cost to it, Parker Dam.

"This contract, among other things, provides that the District shall advance to the United States from time to time sums not to exceed $13,000,000, and the United States shall construct by means of such funds, pursuant to the provisions of the Reclamation Act (c. 1093, 32 Stat. 388), and Acts supplemental thereto, particularly the Act of March 4, 1921 (c. 161, 41 Stat. 1367, 1404), the Act of April 21, 1904 (c. 1402, 33 Stat. 189, 224), and the Act of December 1, 1928 (c. 42, 45 Stat. 1057), the project referred to therein and in this bill of complaint as Parker Dam, for the purpose of controlling floods of the Colorado River and its tributaries below Hoover (Boulder) Dam, *improving and regulating navigation* (Italics supplied), providing for the protection and reclamation of the lands within the Colorado River Indian Reservation in Arizona and public lands of the United States in

Arizona, and for the re-regulation of the waters discharged in the operation of Hoover (Boulder) Dam, required by the provisions of the Boulder Canyon Project Act (c. 42, 45 Stat. 1057)." (Bill Comp. Par. X p. 12).

Under said contract various advantages accrue to the United States for use in its proprietary capacity, particularly the reclamation of public lands, and for the reclamation of lands in the Colorado River Indian Reservation.

An analysis of the contract showing the benefits to accrue to, and the obligations assumed by, the contracting parties will be found on pages 27 to 29 of this brief.

The consent of Arizona to construct Parker Dam in the bed of the River lying east of the thread of the stream and to submerge, by the reservoir to be created by said dam, lands of Arizona lying between the thread of the stream and its east mean high-water line, and extending from the dam twenty miles up stream, not having been obtained, the State of Arizona on November 7, 1934, sent telegraphic advice to the Secretary of the Interior and engineer in charge of construction of the dam that the work could not go forward without the State's consent. The Secretary of the Interior, nevertheless, persisting in the prosecution of the work, the Governor of Arizona on November 10, 1934, issued a proclamation declaring martial law in the area immediately adjacent to the dam location on Arizona's side of the Colorado River and sent the state militia to prevent

trespass and the construction of said dam upon Arizona's property. This suit was, therefore, brought in the Supreme Court for the purpose of enjoining the State from interfering with the construction of said dam.

QUESTIONS PRESENTED

1. Has the Federal Emergency Administrator of Public Works authority under the National Industrial Recovery Act, and particularly Section 202 (c. 90, 48 Stat. 195), to participate on behalf of the United States in the construction of Parker Dam across the Colorado River, a navigable stream, (the expenditure of no public money being involved) without the consent of Congress under the provisions of Section 9 of the Act of March 3, 1899 (30 Stat. 1151)?

2. Has the Secretary of the Interior authority under the laws of Congress to enter into a contract on behalf of the United States with a public corporation organized under the laws of a state, by the terms of which the United States obligates itself to build Parker Dam on the Arizona side of the bed of the Colorado River without the consent of that State, for the purpose of:

(a) "Improving and regulating navigation"; and

(b) Reclaiming public lands and lands in the Colorado River Indian Reservation?

FOREWORD

Arizona sincerely regrets a controversy has arisen between it and the Federal Government. This court may well take judicial knowledge that this suit has its genesis in the ten-year disagreement between Arizona and California over an equitable division of the beneficial use of the waters of the main stream of the Colorado River along its course where it constitutes the boundary between the two states. The Constitution provides for the settlement of conflicting interests or claims between states by compacts or agreements with the consent and approval of Congress. The United States may, likewise, enter into compacts with the several states.

When it became necessary for the Metropolitan Water District of Southern California to construct a dam across the Colorado River in order to divert water to supply the domestic needs of the inhabitants of various cities and communities in Southern California, it would have been more in keeping with the proprieties and amenities which it is the custom of states to observe in their intercourse to have endeavored in good faith to obtain Arizona's consent to construct the Parker Dam rather than pursue a course of circumvention which has embroiled the United States in a controversy in which it should have no other than a solicitious interest. And the same thing may, with equal propriety, be said with reference to the United States in proceeding to construct the dam for reclamation of public and Indian lands.

Likewise, it might well be said that Arizona has at all times had available its remedy in the ordinary and orderly course of judicial proceedings and it was not necessary for it to forcibly stop construction, whatever it might have thought of the wisdom of such a course or of its rights in the premises.

ARGUMENT

Summary

1. Arizona owns in its sovereign capacity the east half of the bed of the Colorado River, a navigable stream, where Parker Dam is proposed to be constructed, subject only to the paramount right of the United States to maintain and improve navigation in interstate and foreign commerce.

2. The right of the United States to occupy and use the beds of navigable streams without the consent of the state having jurisdiction is found in the commerce clause of the Constitution and is restricted to activities undertaken by the Government primarily with the intent to regulate interstate commerce and improve navigation. Neither Congress, the United States nor any of its executive officers can extend the authority of the national Government under the commerce clause to reclaim public and Indian lands under the guise of improving navigation.

3. No dam or other structure which will obstruct

navigation can be erected in any navigable waters of a state by any person without the state's consent, nor by the United States, except for the purpose and with the intent of regulating and improving navigation.

4. It appearing upon the face of the bill of complaint and the affidavits of Commissioner of Reclamation Mead and Secretary of Interior Ickes in support of application for temporary restraining order that the Metropolitan Water District of Southern California is the real party in interest, the dam cannot be constructed without the concurrent consent of Congress and Arizona.

5. It appearing upon the face of the complaint that the construction of the dam is not positively related to the improvement of navigation, but, on the contrary, is an insuperable obstruction, not even the United States itself has authority to build it without the consent of Arizona.

6. The Secretary of the Interior has no power, constitutional or otherwise, to obligate the United States by contract with an individual or corporation with relation to the governmental functions of the United States or obliging it to act or not to act in its sovereign capacity.

7. The United States, in exercising its rights under the commerce clause to regulate and improve navigation, acts in its governmental and sovereign capacity.

Therefore, that portion of the contract between the United States, acting by and through the Secretary of the Interior, and the Metropolitan Water District of Southern California, by which it was sought to obligate the United States to construct the Parker Dam for the purpose of *"improving and regulating navigation"* (a governmental function), is void and imposes no obligation upon the United States.

8. As the United States acts in its proprietary capacity, as distinguished from its governmental, in the reclamation of arid lands, it cannot appropriate any property of the State of Arizona to such a use without the state's consent.

I

ARIZONA OWNS IN ITS SOVEREIGN CAPACITY THE EAST HALF OF BED OF COLORADO RIVER.

United States v. Holt State Bank, 270 U. S. 49, 54, 70 L. Ed. 465, 468.

The right of the United States in the navigable waters within the several states is "limited to the control thereof for the purposes of navigation".

Port of Seattle v. Oregon and Washington R. C., 255 U. S. 56, 63, 65 L. Ed. 500, 506, 41 Sup. Ct. Rep. 237.

"And while Congress, in the exercise of this

> power, may adopt, in its judgment, any means having some positive relation to the control of navigation and not otherwise inconsistent with the Constitution, United States v. Chandler-Dunbar Water Power Co. 229 U. S. 62, 57 L. Ed. 1075, 33 Sup. Ct. Rep. 667, it may not arbitrarily destroy or impair the rights of riparian owners by legislation which has no real or substantial relation to the control of navigation or appropriateness to that end."

United States v. River Rouge Imp. Co., 269 U. S. 411, 419, 70 L. Ed. 339, 345.

The same principle is applicable to lands of a state in the bed of a navigable stream.

As the bill of complaint (Par. II) alleges that the east and west abutments of the dam will rest on the Arizona and California banks of the river, will be of steel and concrete construction, and will extend across the river and raise the water level on the upstream side of the dam seventy-two feet higher than the level on the downstream side, it appears on the face of the complaint that the dam is not an aid to or an improvement of navigation; that, on the contrary, it will be an absolute and insuperable obstacle to navigation between points above and below the dam. Therefore, it can have no "positive relation to the control of navigation" other than to obstruct or destroy it, which is not within the scope of the commerce clause and may not be done without the consent of the state having jurisdiction.

Therefore, the United States, even though acting in its governmental capacity, cannot constitutionally destroy the navigability of a stream unless it, perhaps, be for the purpose of improving navigability of some other related stream.

II

CONCURRENT CONSENT OF CONGRESS AND STATE IS A PREREQUISITE TO CONSTRUCTION OF A DAM.

In *Pigeon River Improvement Slide and B. Co. v. Cox*, 291 U. S. 138, 159, 78 L. Ed. 695, 704, this court said:

> "Where, under section 9 of the Act of March 3, 1899, the consent of Congress is required for the erection of structures in or over navigable waters not lying wholly within a State, 'the act does not make Congress the source of the right to build but assumes that the right comes from another source, that is, the State;' it merely subjects the exercise of the right 'to the further condition of getting from Congress consent to action upon the grant.' International Bridge Co. v. New York, 254 U.S. 126, 133, 65 L. Ed. 176, 184, 41 S. Ct. 56."

Pigeon River, with which the court was dealing, formed the international boundary between the State of Minnesota and the Province of Ontario and in that respect presents the same situation as does the Colorado River where it is the boundary between Arizona

and California.

Section 12 of the Rivers and Harbors Appropriation Act of 1899 as amended by Section 2 of the Act of February 20th, 1900, supra, makes it a criminal offense for anyone to construct a dam across a navigable river without the consent of Congress. If this court should hold that Congress has not consented and its consent is necessary to the construction of the Parker Dam, then the contract between the Secretary of the Interior and the Water District is void as providing for the doing of an act which is made a crime.

> "Moreover, erection of the bridge without state consent would constitute a direct evasion of the federal statute above quoted, violation of which is made a crime. Under elementary principles, any contract entered into by the city in violation of such a penal statute renders the contract void. See Berka v. Woodward, 125 Cal. 119, 126, 57 P. 777, 45 L. R. A. 420, 73 Am. St. Rep. 31; Stockton Plumbing & Supply Co. v. Wheeler, 68 Cal. App. 592, 601, 229 P. 1020."

Southlands Company v. City of San Diego, (Supreme Ct. Cal.) 297 P. 521, 526.

As a general rule, all contracts or agreements which involve or have for their object the violation of law, are illegal. See 13 C. J. 411, Note 99, where many cases from this court, as well as from state courts, are cited.

III

ADMINISTRATOR OF PUBLIC WORKS IS WITHOUT AUTHORITY TO BUILD PARKER DAM IN THE ABSENCE OF A SHOWING OF PRIOR APPROVAL OF CONGRESS.

In Paragraph I of the bill it is alleged that the United States, acting through the Federal Emergency Administrator of Public Works as well as the Secretary of the Interior, is constructing the dam, while in Paragraph III of the bill it is alleged that the Parker Dam project has been included by the Federal Emergency Administrator of Public Works in the comprehensive program of public works referred to and authorized by Section 202 of the National Industrial Recovery Act, supra, and that (Bill Par. IV) the Chief of Engineers of the Army has recommended its construction and his recommendation has been approved by the Secretary of War.

It is not alleged that any public funds are being used by the Public Works Administrator in such construction and it appears affirmatively from the complaint that the work is being done without cost to the Federal Government and with funds furnished by the Metropolitan Water District. When that situation is considered in connection with the fact that the contract between the Secretary of the Interior and the Water District is dated February 10th, 1933, whereas the National Industrial Recovery Act, which created the office of Public Works Administrator, was not approved until June 16th, 1933, it is somewhat diffi-

cult to understand what the Administrator's functions or his authority in the premises may be.

Under the proviso in Section 202 of the National Industrial Recovery Act, supra, the Administrator is prohibited from carrying out any river or harbor improvement works unless "they shall have heretofore or hereafter been adopted by the Congress *or* recommended by the Chief of Engineers of the United States Army". While the express language of the proviso, in the absence of a consideration of the history of river and harbor improvement legislation, might be read in the alternative, that is, to require that the proposed improvements must receive the adoption of *either* Congress or of the Chief of Engineers, such a construction is illogical and untenable, unless, indeed, Congress by section 202 intended to waive in favor of the Federal Administrator of Public Works the necessity of obtaining its consent under the provisions of Sections 9 and 10 of the Act of 1899 to the construction of dams, bridges and other structures in the navigable waters of the United States. There is no need of such a construction in order to give full effect to the proviso.

In *Wisconsin v. Illinois*, 278 U. S. 399, 417, 73 L. Ed. 426, 434, this court reconciled the apparent conflicts between Sections 9 and 10 of the Rivers and Harbors Appropriation Act of 1899, and held that the express consent of Congress, as well as the approval of the Chief of Engineers and the Secretary of War, is necessary to authorize the building of a "bridge, dam, dike or causeway" over or in any navigable wa-

ters of the United States; that the approval of the Chief of Engineers and the Secretary of War without the express consent of Congress, is sufficient authorization to place in navigable waters any of the structures mentioned in Section 10 which do not unreasonably obstruct navigation. Undoubtedly, Congress, in enacting the proviso contained in Section 202 of the National Industrial Recovery Act had in mind the provisions of Sections 9 and 10 of the Act of 1899 and the construction placed thereon by the Supreme Court in the *Wisconsin v. Illinois* case; and intended, under the proviso, that the Administrator of Public Works could only undertake the construction of such river and harbor improvements of the class mentioned in Section 9 as had theretofore or might thereafter be adopted by Congress, but that he was at liberty to proceed to construct, without the consent of Congress, any river and harbor improvement involving structures of the character mentioned in Section 10, and which did not unreasonably obstruct navigation and which had theretofore or might thereafter be recommended by the Chief of Engineers of the Army. Such a construction brings the proviso of Section 202 in harmony with the long-established policy of Congress in relation to control of the navigable waters of the United States. Any other construction would necessarily imply a delegation by Congress of all of its authority and control over river and harbor improvements to the Administrator of Public Works and to the Chief of Engineers of the Army, which is not to be presumed and must be clearly expressed. It is doubtful if Congress may so surrender or delegate its governmental functions over navigable waters.

IV

UNITED STATES HAS NO CONSTITUTIONAL AUTHORITY TO CONSTRUCT PARKER DAM FOR RECLAMATION OF PUBLIC AND INDIAN LANDS WITHOUT CONSENT OF ARIZONA.

The bill of complaint sets up the authority of the Secretary of the Interior, and through him that of the United States, to build Parker Dam without Arizona's consent as being founded under the Reclamation Act and acts supplemental thereto, the Boulder Canyon Project Act and various acts of Congress approved subsequent to 1865 and including 1910, providing for the irrigation of lands in the Colorado River Indian Reservation and making appropriations therefor. It also relies upon paragraph 7 of section 20 of the Act of June 20, 1910 (c. 310, 36 Stat. 557, 570) authorizing the admission of Arizona as a state, which, paraphrased, reads as follows:

> "Seventh: That there be and are reserved to the United States, with full acquiescence of the state, all rights and powers for the carrying out of the provisions of the Reclamation Act and amendatory and supplemental acts to the same extent as if said state had remained a territory."

Also, at the beginning of Paragraph X of the bill of complaint, it is alleged that "for the purpose of carrying out the provisions of the acts of Congress authorizing the construction of Parker Dam in the bed of the Colorado River at the place hereinafter set out

and pursuant to the paramount constitutional powers of the United States", the contract with the Metropolitan Water District was entered into. We have found no act of Congress directly or indirectly authorizing the construction, or even so much as mentioning, Parker Dam.

The Boulder Canyon Project Act only authorizes the Secretary of the Interior to construct the Hoover Dam and "a suitable diversion dam, . . . if deemed advisable by him upon engineering and economic conditions" to serve as a diversion dam for the All American Canal for the irrigation of Imperial and Coachella Valleys in California.

In none of the acts of Congress pleaded, nor in any that we have been able to find, is the Secretary of the Interior given any general power to construct river and harbor improvements, and we are confident that no such law exists. The Secretary's authority for entering into the pleaded contract with the Metropolitan Water District must be found, if at all, in section 20 the Act of February 21, 1911, known as the "Warren Act", supra, by which he is authorized to co-operate with other persons, corporations and associations in the construction of such reservoirs and canals as may be advantageously used by the Government in carrying out the provisions of the Reclamation Law.

In *McLean v. Truckee-Carson Irrigation District*, 245 P. 285, 288, 49 Nev. 278, a contract between the United States, acting through the Secretary of Interior, and the Truckee-Carson Irrigation District for

the construction of a canal for the irrigation of lands within the district, was held valid. However, the district was formed to include and to be a part of the administrative authority of the United States Newlands Reclamation Project, authorized Act of Congress of June 17th, 1902.

Congress has not authorized construction of the Parker-Gila project and it now has no more than a nebulous existence.

Neither does the complaint allege that the Parker-Gila project has "been recommended by the Secretary of the Interior and approved by the direct order of the President of the United States", which, under the provisions of section 4 of an Act of June 25th, 1910, (c. 407, 36 Stat. 836) is necessary before any irrigation project can be begun under the Reclamation Act.

It would seem that in the absence of an Act of Congress or a recommendation of the Secretary of the Interior, approved by *direct order* of the President, the Secretary has no power or authority to begin the construction of the Parker-Gila project, and any co-operative contract entered into by him, which otherwise might be authorized by the act of February 21, 1911, is without authority of law.

Therefore, the Secretary must base his entire authority under one or more of the various acts cited by him providing for the irrigation of lands of the Colorado River Indian Reservation and making appropriation therefor, by none of which is he authorized to en-

ter into a co-operative contract with others for the construction of works which may be advantageously used by the government in the irrigation of such lands.

V

UNITED STATES, IN THE RECLAMATION OF PUBLIC LANDS, ACTS IN ITS PROPRIETARY CAPACITY.

As heretofore stated, the right of the United States in the navigable waters of a state are limited to the regulation and improvement of navigation in interstate and foreign commerce. It, therefore, has no sovereign rights in the stream for the purpose of reclamation of public or Indian lands, and in those activities it acts in the capacity of a proprietor of its own lands and as a guardian or trustee of Indian lands.

The following is quoted from the opinion of the Circuit Court of the District of Idaho in *Twin Falls Canal Co. v. Foote*, 192 Fed. 583, 594:

> "In prosecuting such an enterprise (reclamation project), however, it (the United States) is not primarily performing a governmental, or, strictly speaking, even a public function, but is promoting its proprietary interests. Such advantage as arises therefrom to the people at large is material and not governmental, and is only such as might indirectly accrue to the public from the reclamation of an equal amount of land through

private enterprise. Kansas v. Colorado, 206 U. S. 46, 92, 27 Sup. Ct. 655, 51 L. Ed. 956; United States v. Hanson, 167 Fed. 881, 93 C. C. A. 371; United States v. Burley 172 Fed. 615, Id., 179 Fed. 1, 102 C. C. A. 429."

VI

UNITED STATES CAN ASSERT NO RIGHTS UNDER PARAGRAPH 7 OF SECTION 20 OF THE ACT ADMITTING ARIZONA AS A STATE.

In paragraph IX of the Bill of Complaint the United States has pleaded as one of its sources of authority paragraph 7 of Section 20 of the Enabling Act providing for the formation of Constitutions by Arizona and New Mexico and their admission to the Union as states, quoted on Page 4, this brief.

Any limitation imposed by Congress as a condition to admission which sought to have the effect of limiting the state's sovereign title to the beds or waters of its navigable streams, or to restrict its common law right to regulate navigation, was void and of no effect, after Arizona ceased to be a territory and became a state.

In *Coyle v. Smith*, 221, U. S. 559, 572, 55 L. Ed. 853, 860, it was held that when a new state is admitted to the Union, it becomes vested by the mere fact of admission with all the sovereignty possessed by the thirteen original states after the adoption of the Constitution of the United States. The court used the follow-

ing language:

> "The plain deduction from this case is that when a new state is admitted into the Union, it is so admitted with all of the powers of sovereignity and jurisdiction which pertain to the original states, and that such powers may not be constitutionally diminished, impaired, or shorn away by any conditions, compacts, or stipulations embraced in the act under which the new state came into the Union, which would not be valid and effectual if the subject of congressional legislation after admission."

The rule is well stated in 59 C. J. 68, 69, where all the cases are collected. It is stated that in determining the validity of conditions as fixed by Congress in the admission of states, there are three to be distinguished, the third of which is:

> "third, compacts or affirmative legislation which operates to restrict the powers of such new state in respect of matters which would otherwise be exclusively within the sphere of state power. . . . "as to the third, however, there is no power in congress to prescribe any such conditions, operating to limit in the future the legislative power of a new state over matters in their nature confided exclusively to the states as a part of their sovereign powers; their equality with the older states cannot be impaired in such matters by the provisions of enabling acts or conditions otherwise im-

posed by congress upon, and at the time of, admission."

Pursuant to the provisions of the Enabling Act, Arizona incorporated paragraph 7 of section 20 of that act in its Constitution as section 10 of Article 20. However, on June 7th, 1927, an amendment to the Arizona Constitution repealing that clause became effective.

As the original thirteen states had the sovereign right to regulate navigation and to prohibit and remove obstructions in navigable waters, the provision in the Enabling Act relied upon by the United States had no effect to limit the future powers of the State in that respect.

In paragraph VIII of the Bill it is stated that the construction of the Boulder Dam and the Parker Dam pertain to the same general public purpose as expressed by Congress in enacting legislation for the regulation, control and improvement of the Colorado River system, including the regulation of the Colorado River respecting navigation.

Probably the purpose of that allegation is to bring the construction of the Parker Dam within the rule or exception recognized by this Court in *Pigeon River Improv. S. & B. Co. v. Cox*, 291 U. S. 138, 159, 78 L. Ed. 695-704.

In that case the consent of Congress had been obtained by a private corporation to construct works on

a designated portion of the Pigeon River so as to make it navigable, and it was held that that carried with it Congress' implied authority to construct appropriate improvements in other portions of the river without which the works expressly authorized would be useless.

Congress expressly authorized the construction of the Boulder reservoir in the Colorado River at head of navigation for the declared purpose of improving downstream navigation. This Court in *Arizona v. California*, 283 U. S. 423, 453, 75 L. Ed. 1154, 1164, took judicial knowledge of the fact that the Colorado River is navigable and had in fact been navigated in interstate commerce from the Gulf of California to as far north as the Virgin River, a short distance above Boulder Dam, and the bill so alleges.

The Secretary in this case must show the express or necessarily implied congressional authority, for he is acting in a representative capacity, whereas the corporation in the Pigeon River case had no such burden and neither the United States nor the State of Minnesota raised the point, and the river had actually been made navigable. The Parker Dam, on the contrary, is to be constructed in a section of the stream for the improvement of which Congress authorized the building of the Boulder Dam. Instead of further improving navigation, as was the case on the Pigeon River, Parker Dam is an absolute and unsurmountable obstruction to navigation between points above and below its site. The Secretary of the Interior and Public Works Administrator, without

the consent of Congress, propose to destroy the navigability of the very section of the river which Congress is now improving at an expenditure of $165,000,000 under the Boulder Canyon Project Act.

VII.

IT APPEARS UPON THE FACE OF THE COMPLAINT THAT THE UNITED STATES IS NOT THE REAL PARTY IN INTEREST.

It clearly appears from the reading of the Bill that the Metropolitan Water District of Southern California is the real party in interest.

The contract, as disclosed by the Bill, particularly Paragraph X, is most extraordinary and is such an agreement as no reasonable man occupying the situation of the Water District, except for its problems in constructing, the dam across a navigable stream, would have entered into. It is quite true that enormous advantages accrue to the United States under the contract, but that is no justification in law for trespassing upon property held by Arizona as a sovereign or for appropriating it to the use of the United States and the Metropolitan Water District without Arizona's consent.

The affidavit of the Commissioner of Reclamation, Mead, on file in this cause in support of the application for temporary injunction, shows that on the 25th day of August, 1934, the United States sublet to Six Companies Inc., a California corpora-

tion, construction of the Parker Dam pursuant to the terms of the Government's contract with the Metropolitan Water District of Southern California. It is not to be presumed that the Government is in the contracting business for profit. It is acting simply as a medium of passage from the Metropolitan Water District to the Six Companies Inc. of the money which it receives under the contract to defray the cost of construction.

While enormous advantages accrue to the United States in its proprietary capacity under the alleged contract with the Metropolitan Water District, it is all too apparent, and regrettably so, that the sole and only purpose of the Metropolitan Water District in procuring the contract with the United States through the Secretary of the Interior was that it might thereby interpose the power and authority of the Federal Government as a stop-gap between it and the State of Arizona, and strengthen its position in its effort to build Parker Dam without the concurrent consent of Congress and Arizona.

We give a brief analysis of the provisions of the contract as they appear in Paragraph X:

Obligations Assumed by United States

1. To construct Parker Dam with money advanced by the District from time to time, not exceeding $13,000,000, for the purpose of:

(a) Controlling floods of the Colorado River and its tributaries;

(b) *Improving* and *regulating navigation;*

(c) Providing for the protection and reclamation of the lands in the Colorado River Indian Reservation and public lands in Arizona;

(d) For the re-regulation of the water discharged at Boulder Dam.

2. Operation and maintenance of the reservoir, dam and outlet works.

Advantages Accruing to the United States

1. Use without cost of 42,500 continuous hydroelectric horsepower for irrigation and drainage of Indian lands and public lands in the proposed Parker-Gila Reclamation Project (of a value of from $12,000,000 to $17,000,000, Governor Moeur's affidavit).

2. Right of transmission of power over Water District's lines from Boulder Dam to Parker Dam at cost;

3. Right to use Parker Dam and reservoir as diversion facilities for reclamation of Indian and public lands in Arizona or California;

4. Right to divert water from the Colorado River;

5. Title and ownership of the Dam costing $13,000,000;

Rights Accruing to the Water District

1. 42,500 continuous hydro-electric horsepower;

2. The right to divert water from the dam and reservoir created thereby.

3. Relief from cost of operation and maintenance.

It is clear that the Metropolitan Water District anticipated some very valuable considerations which are not expressed in the contract in return for surrendering title to the government of a structure to cost $13,000,000 and granting the government the right to free use of 42,500 continuous horsepower of hydro-electric energy of a value of more than $12,000,000.

That United States, as a proprietor or trustee, will not reap the advantages of its contract is beside the question. It has no right under the Constitution to trade either its own or a state's sovereign right to preserve navigation in return for facilities for irrigating public and Indian lands.

VIII

SECRETARY OF THE INTERIOR HAS NO AUTHORITY TO BIND UNITED STATES IN EXERCISE OF ITS GOVERNMENTAL FUNCTIONS.

The United States in exercising its power of regu-

lating and improving navigation acts strictly within the scope of the governmental functions delegated to it by the States under the commerce clause of the Constitution. It is a principle of constitutional law that neither a State nor the Federal government can barter away or contract to exercise or not to exercise its governmental functions, including the right to regulate and improve navigation, except by treaty with a foreign nation.

IX

APPROVAL OF CONSTRUCTION OF PARKER DAM BY CHIEF OF ENGINEERS AND SECRETARY OF WAR NOT EQUIVALENT TO CONSENT OF CONGRESS

The license or permission of the Secretary of War for the construction of Parker Dam amounts only to a declaration by such officer that in his opinion the proposed structure is not an unreasonable obstruction to navigation and will not interfere with, nor be detrimental to, navigation, and is not equivalent to a positive declaration by authority of Congress that the licensee may build the structure without first obtaining the consent of the owner of the submerged land on which it is to be built.

Cobb v. Lincoln Park, 202 Ill. 427, 67 N. E. 5.

Truly, Congress could not, nor did it so intend, to authorize the Federal Emergency Administrator of

Public Works and the Secretary of Interior, with the concurrence of the Chief of Engineers of the Army, or the United States, acting by or through either one or both of those executive officers, to trespass upon and to confiscate the property or to invade the rights of the State of Arizona under any conditions whatsoever, nor the property or rights of any individuals or corporations except according to due process of law.

The "normal power of the Secretary of War under Section 10 of the Act of March 3, 1899, is to maintain the navigable capacity" of navigable waters within his jurisdiction and "not to restrict it or destroy it."

Wisconsin v. Illinois, 278, U. S. 399, 417, 73 L. Ed. 426, 434.

The same principle naturally applies to the very limited powers vested in the Administrator of Public Works and the Chief of Engineers under the proviso of Section 202 of the National Industrial Recovery Act.

X

UNITED STATES WILL NOT SUFFER DAMAGE IF RESTRAINING ORDER IS NOT GRANTED

The affidavits of Honorable Elwood Mead, Commissioner of Reclamation, and Honorable Harold L. Ickes, Secretary of the Interior, filed in this court in support of the application of the United States for

a temporary restraining order, when read in connection with the bill of complaint, affirmatively show that the United States will not suffer any damage, irreparable or otherwise, by reason of the matters and things alleged in the bill of complaint should a temporary restraining order or a permanent injunction not issue, for the reason that the bill and particularly Paragraph X thereof, affirmatively shows that the United States is not obligated under the terms of said contract with the Metropolitan Water District to lay out or expend any funds whatsoever in the construction of Parker Dam other than the funds from time to time advanced to it by said Water District, and it further affirmatively appears from said paragraph of the bill that said contract provides that the United States shall not contribute anything to the cost of the dam.

In the affidavits of the Commissioner of Reclamation and the Secretary of the Interior supporting the application for temporary restraining order, it is averred, among other things, that many advantages and benefits will accrue to the State of Arizona by the construction of Parker Dam and that damage to the state will not be great.

The Government is evidently seeking to conversely apply the equitable principle that where a *plaintiff* seeks an injunction to restrain the doing of an act which will be of slight damage him and of great benefit to the defendant or the public, the court, upon a balancing of the equities, may, in its judicial dis-

cretion, deny injunctive or other equitable relief, leaving him to his remedy at law for damage.

The distinction is that the defendant in this case is seeking no equitable relief and is only pursuing its common law right to forcibly repel trespass upon its property. In such case, the damage which may result by reason of the threatened trespass is no element in the measure of its right to repel. It is, indeed, a new principle of equity which the plaintiff seeks to invoke, namely, the right to appropriate the defendant's property to its own use upon the theory that it will redound to its good and advantage and not seriously damage it.

In this case, the United States being the threatening trespasser and not amenable to suit for damages in tort, the defendant would have no remedy at law on account of the trespass.

From the affidavits of the Commissioner of Reclamation and the Secretary of the Interior it would seem they have abandoned the fictitious theory of improving navigation, for it is not mentioned. It would appear they are commendably unwilling to take oath to the allegations of the bill pertaining to navigation.

The bill alleges that a reservoir extending twenty miles upstream from the dam will be created. This court may take judicial knowledge of the geographical and physical features of the United States. From such knowledge it knows that the Parker reservoir will submerge several thousand acres of land

owned by Arizona between the mean low and mean high water lines on the east side of the river, which with a regulated flow through Boulder Dam would become valuable for agriculture.

XI

SIGNIFICANCE OF BELATED APPROVAL OF PARKER DAM AS RIVER AND HARBOR PROJECT

It will be noted from the affidavit of Honorable B. B. Moeur, Governor of the State of Arizona, that the Chief of Engineers of the United States Army and the Secretary of War did not approve the construction of the Parker Dam until January 4th and January 5th, 1935, respectively, which was approximately four months after it is alleged the construction of the dam was commenced and two months after Arizona had forcibly stopped construction on the east side of the River.

The Secretary of the Interior has no general power to improve navigation and he has not been specifically authorized to construct Parker Dam. The Administrator of Public Works is expressly prohibited by the proviso in Section 202 of the National Industrial Recovery Act from undertaking river and harbor improvements without the prior approval of Congress or the Chief of Engineers.

Presumably, no public official in the execution of his duties will knowingly exceed his authority or vio-

late the positive provisions of a statute. Therefore, we must presume that neither the present incumbent's predecessor in the office of the Secretary of the Interior in executing the contract with the Metropolitan Water District, nor Mr. Ickes in either of his dual capacities as Secretary of the Interior and Administrator of Public Works in undertaking the dam's construction, had in mind the improving of the Colorado River for navigation. When it is considered that the approval of Parker Dam by the Chief of Engineers of the Army and the Secretary of War was not obtained until the 4th and 5th of January, 1935, respectively, we may further presume that it was not until then that the idea of improving navigation occurred to either the Secretary of the Interior or Administrator of Public Works. And when it is further considered that this suit was filed nine days after the approval of the dam by the Chief of Engineers and the Secretary of War, we are constrained to further presume that such approval was obtained for the purpose of laying the foundation for this suit and without any relation to river improvement.

It further appears from the affidavit of the Governor of Arizona that the Administrator of Public Works did not include Parker Dam in his program of public works until December 28th, 1933, more than ten months after the date of the contract between the Secretary of the Interior and the Water District.

SUMMATION

In conclusion we advance the proposition:

That unless upon the facts stated in the Bill of Complaint and the law applicable thereto it appears that Parker Dam is being constructed by the United States, acting in its sovereign and governmental capacity, for the purpose of regulating and improving navigation of the Colorado River in interstate and foreign commerce and that said dam has some positive relation thereto, this suit must fail.

JOHN L. SULLIVAN,
Attorney General of Arizona.

JAMES R. MOORE,
Special Assistant Attorney General.
Solicitors for Defendant.

HERMAN LEWKOWITZ
Of Counsel
February, 1935.

No. 18 ORIGINAL

In the Supreme Court
OF THE
United States

October Term, 1934

UNITED STATES OF AMERICA,
Plaintiff,

vs.

STATE OF ARIZONA,
Defendant.

ANSWER

The State of Arizona, by its Attorney General and Special Assistant Attorney General, answers the Bill of Complaint in the above entitled cause as follows:

I.

Answering the allegations of Paragraph I of the Bill of Complaint, the defendant admits that on or about September 10, 1934, The United States of America, acting by and through the Secretary of the Interior, commenced the construction of Parker Dam, described in the Bill of

Complaint, in the main stream of the Colorado River, but denies that in the construction of said Dam, the United States acted by or through the Federal Emergency Administrator of Public Works, or that either said Administrator or the Secretary of the Interior commenced the construction of said Dam pursuant to, or by the authority of, the Constitution and laws of the United States, or for the purpose of controlling floods and regulating navigation, or for irrigating and reclaiming lands within the Colorado River Indian Reservation or public lands of the United States, or for protecting Federal property from damage by floods by re-regulating the water discharged at Hoover Dam.

Further answering Paragraph I of the Bill of Complaint, the defendant alleges that the Secretary of the Interior, assuming to act for and on behalf of the United States, did on or about the 23rd day of August, 1934, enter into a contract with Six Companies, Inc., a California corporation, to construct said Dam for the primary use and benefit of the Metropolitan Water District of Southern California, a corporation organized under the laws of California, wholly with funds to be furnished the Secretary of the Interior by said Water District pursuant to a purported contract dated the 10th day of February, 1933, between said District and the United States, acting by and through the then Secretary of the Interior of the United States, a copy of which said contract is hereto attached as an appendix to this answer and by reference made a part hereof.

II.

Defendant admits the allegations of Paragraph II of the Bill of Complaint, other than the allegations therein contained to the effect that Parker Dam and the reservoir to be created thereby will have the effect, or may be so used or operated, as to improve or aid navigation, and the defendant alleges, on the contrary, that said Dam and reservoir, when, and if constructed, will be an insuperable obstacle and impediment to navigation and will prevent navigation of the Colorado River between points above and below said Dam.

III.

Answering Patagraph III of the Bill of Complaint, the defendant admits that said Parker Dam has been included by the Federal Emergency Administrator of Public Works in the comprehensive program of public works referred to and authorized by Section 202 of the National Industrial Recovery Act, but in this connection, defendant alleges that said Dam project was not so included in said program of public works until December 28, 1933, more than ten months after the date of the contract between the Secretary of the Interior and the Metropolitan Water District of Southern California, by the terms of which the Secretary of the Interior assumed to bind the United States to construct said Dam for the benefit of said District.

IV.

Answering Paragraph IV of the Bill of Complaint, the defendant admits that the Chief of Engineers of the

United States Army has recommended the construction of said Parker Dam and project and said recommendation has received the approval of the Secretary of War, but in this connection, the defendant alleges that the Chief of Engineers did not recommend the construction of said Dam and the same was not approved by the Secretary of War until January 4th and January 5th, 1935, respectively, and that the construction of said Dam has not at anytime been authorized by an Act of Congress nor consented to by the State of Arizona.

V.

Answering the allegations of Paragraph V of the Bill of Complaint, the defendant admits that the Colorado River is an interstate stream flowing between the States of Arizona and California and the flow of the Bill Williams River ranges from nine cubic feet per second to over fifty cubic feet per second, but it denies that after the construction of Boulder Dam and the consequent regulation of the Colorado River, the floods of the Bill Williams River will be a menace to the lands of the Colorado River Indian Reservation, the public lands of the United States or to navigation of the Colorado River below the site of Parker Dam.

VI.

Defendant admits the allegations of Paragraph VI of the Bill of Complaint.

VII.

Defendant admits the allegations of Paragraph VII of the Bill of Complaint.

VIII.

Answering the allegations of Paragraph VIII of the Bill of Complaint, the defendant denies that the construction of Boulder Dam and Parker Dam pertain to the same general public purposes as expressed by Congress in enacting legislation for the regulation, control and improvement of the Colorado River System, including the regulation of the Colorado River respecting navigation, and in this connection alleges that the construction of Parker Dam has not been authorized by Congress and that its construction will destroy the navigability of the Colorado River between points above and below its site and have the effect of neutralizing and destroying the navigability of said River so to be improved as provided in the Boulder Canyon Project Act.

IX.

The defendant admits the allegations of Paragraph IX of the Bill of Complaint, except that it denies that Parker Dam is so designed as to irrigate lands within the Yuma or Colorado River Indian Reservation, or public lands in Arizona or California, except insofar as it may be utilized to develop hydro-electric power to be used for pumping and diverting water from the Colorado River for irrigation of such lands at points south of the site of said Dam.

Further answering Paragraph IX of the Bill of Complaint, the defendant alleges that the provisions of the Act of Congress of June 20, 1910 (c. 310, 36 Stat. 557,

570) by which Congress sought to limit the governmental and sovereign powers of the State of Arizona over the navigable waters within the State and to create an easement, or to reserve any rights of the United States in said waters, or the beds thereof, for its use in carrying out the provisions of the Reclamation Act or Acts amendatory thereof, or supplementary thereto, are void as in conflict with the constitutional principle of equality of the states.

X.

Answering the allegations of Paragraph X of the Bill of Complaint, the defendant alleges that it has attached hereto as an appendix, marked Exhibit "A", a true copy of the alleged contract of February 10, 1933, between the United States and the Metropolitan Water District of Southern California, and denies the allegations of said Paragraph X insofar as they are inconsistent with the provisions of said contract.

XI.

Defendant admits the allegations of Paragraph XI of the Bill of Complaint.

XII.

The defendant admits the allegations of Paragraph XII of the Bill of Complaint, except that it denies that the construction of said Parker Dam will not jeopardize or adversely effect any of its rights or authority, and it denies that unless the defendant, its officers and agents,

are prevented from interfering with the construction or the erection of said Dam, the Constitutional power and authority of the United States in respect to control of navigable rivers in aid of navigation and the use thereof and in the creation of public works will thereby be defeated and set at naught. In this connection defendant alleges that said Dam has no reasonable relation to the improvement of the navigation of said River other than to destroy it, and that its construction will be primarily for the advantage of the Metropolitan Water District of Southern California, and but incidentally to the advantage and benefit of the United States and to that extent only in its proprietary capacity.

XIII.

Answering the allegations of Paragraph XIII of the Bill of Complaint, the defendant denies that the plaintiff has no plain, speedy and adequate remedy at law and that unless the defendant, its officers, representatives and agents are restrained and enjoined from interfering with the construction of said Parker Dam, great and irreparable damage and injury to the United States will result, and in this connection the defendant alleges that no injury will so result to the United States, irreparable or otherwise, for the reason, among others, that the entire cost of the construction of said Dam is to be borne by the Metropolitan Water District of Southern California and not by the United States.

XIV.

Further answering the Bill of Complaint, the defendant is advised and accordingly alleges that the facts therein stated are insufficient to constitute a valid cause of action in equity against it and that it affirmatively appears upon the face of such Bill of Complaint that the United States of America is not the real party in interest and that the Metropolitan Water District of Southern California, a corporation, is the real party in interest.

WHEREFORE, the defendant prays that the Bill of Complaint be dismissed and for such other and further relief as to the Court may seem meet.

JOHN L. SULLIVAN,
Attorney General,

JAMES R. MOORE,
Special Assistant Attorney General.

Solicitors for Defendant.

HERMAN LEWKOWITZ,
Of Counsel.

APPENDIX

COOPERATIVE CONTRACT FOR CONSTRUCTION AND OPERATION OF PARKER DAM

Article

1. Preamble.
2-9. Explanatory recitals.
10. Construction by the United States.
11. Funds to be provided by the district.
12. No obligation by the United States to pay for work constructed.
13. Preparation of plans and specifications.
14. Duration of contract.
15. Power and other privileges.
16. Installation of Machinery.
17. Operation and maintenance of reservoir, dam, and outlet works.
18. Operation and maintenance of power plant and power-plant buildings.
19. Title.
20. United States to be held harmless.
21. Access to work and to books and records.
22. Existing contracts between the United States and the district not affected.
23. Transfer of interest in contract.
24. Rules and regulations.
25. Agreement subject to Colorado River compact.
26. Disputes and disagreements.
27. Member of Congress clause.

COOPERATIVE CONTRACT FOR CONSTRUCTION AND OPERATION OF PARKER DAM

1. This contract, made this 10th day of February, 1933, pursuant to the act of Congress approved June 17, 1902 (32 Stat. 388), and acts amendatory thereof or suplementary thereto, all of which acts are commonly known and referred to as the reclamation law, and particularly pursuant to the act of Congress approved March 4, 1921 (41 Stat. 1367, 1404), section 25 of the act of Congress approved April 21, 1904 (33 Stat. 189, 224), and the act of Congress approved December 21, 1928 (45 Stat. 1057), designated the Boulder Canyon project act, and the Metropolitan Water District act of the Legislature of the State of California (Stats. 1927, chap. 429), as amended, particularly section 5, subdivision (9) thereof, between the United States of America, hereinafter referred to as the United States, acting for that purpose by Ray Lyman Wilbur, Secretary of the Interior, hereinafter styled the Secretary, and the Metropolitan Water District of Southern California, a public corporation, hereinafter referred to as the District, organized and existing under and by virtue of the laws of the State of California.

Witnesseth:

EXPLANATORY RECITALS

2. Whereas, these parties have heretofore on April 24, 1930, and September 28, 1931, entered into two contracts entitled respectively "Contract for Delivery of

Water" and "Supplementary Contract for Delivery of Water," which said contracts provide, among other things, for the delivery by the United States to the district each year from the Boulder Canyon Reservoir of quantities of water at a point in the Colorado River immediately above the district's point of diversion (at or in the vicinity of the proposed Parker Dam hereinafter referred to), and have also entered into two contracts (dated April 26, 1930, and May 31, 1930), for the purchase by the district from the United States of certain quantities of electrical energy to be generated at Hoover Dam, for the pumping of said water into and in an aqueduct to be constructed by the district; and

3. Whereas, the said point of delivery and the proposed Parker Dam are approximately ten (10) miles above the boundaries of the Colorado River Indian Reservation as designated by the act of Congress approved March 3, 1865 (13 Stat. 559), and there are now being irrigated, by pumping, approximately 6,000 acres of land within said reservation, and water has been reserved and appropriated pursuant to said act as amended or supplemented and particularly by the act of April 4, 1910, (36 Stat. 273), for additional lands within said reservation susceptible of irrigation from the Colorado River, the reclamation of which will require diversion from the river by construction of a dam, or by pumping or both, and will require drainage of said lands by pumping, for all of which electrical energy is needed; and

4. Whereas, there are also in Arizona, additional public and other lands in the vicinity of said reservation and also in the Gila Valley susceptible of irrigation from the Colorado River, but requiring pumping for such purposes, for which electrical energy will be needed, and the United States has now under way an investigation of possible reclamation of such areas as authorized by section fifteen (15) of the said Boulder Canyon project act; and

5. Whereas, the reclamation of said Indian and public and other lands will be rendered more feasible by the availability of stored water and electrical energy at the proposed Parker Dam, and the floods of the tributaries of the Colorado River between Hoover Dam and Parker Dam will be controlled, and navigation improved, by said dam; and

6. Whereas, the Secretary is authorized by said act of April 21, 1904 (33 Stat. 224), to build the proposed Parker Dam for the reclamation of all or any portion of the irrigable lands on the Yuma and Colorado River Indian Reservations in California and Arizona; and such authority has been reserved in the Arizona enabling act (act of June 20, 1910, 36 Stat. 570, 575), and

7. Whereas, the district is engaged in a project involving the construction of an aqueduct for the purpose of diverting and conveying water from the Colorado River

to the metropolitan area of Southern California for domestic, municipal and other useful purposes, and as a means of such diversion, desire storage in the main stream of the Colorado River at the site of the proposed Parker Dam, for the purpose, among others, of desilting water, reducing pump lift and developing incidental electrical energy for pumping water into and in said aqueduct and other uses subordinate to the said aqueduct project, and the district desires to utilize the proposed Parker Dam in common with the United States and is willing to pay to the United States the entire capital cost of construction of said dam, as hereinafter set forth, and is further willing that one-half of the power privilege created by said dam shall be reserved to the United States for the purposes of irrigation and drainage of lands in Arizona within the Colorado River Indian Reservation, as now constituted, and the Gila or Gila-Parker project, without contribution by the United States to the capital cost of the proposed dam, as hereinafter set forth, and is also willing that the dam be utilized by the United States for the storage and diversion of water for the requirements of Indian, public, and other lands in Arizona; and

8. Whereas, the Secretary is authorized by the act of Congress approved March 4, 1921, to receive moneys from the district as aforesaid and to affect therewith the construction of the proposed works as though said moneys were specifically appropriated for said purposes; and

9. Whereas, funds are not otherwise available for the construction by the United States of said dam and the provision of storage and diversion facilities and of appurtenant works for the irrigation and drainage of said Indian, public, and other lands in Arizona and the cooperative construction of the said dam and works as herein provided, will be mutually advantageous to the parties hereto, and the cost of said dam and appurtenant works will be materially less if constructed during the period of completion of the Hoover Dam now under construction than would otherwise be the case;

Now, therefore, in consideration of the mutual covenants herein contained, the parties hereto agree as follows, to-wit:

CONSTRUCTION BY THE UNITED STATES

10. The United States will, with funds advanced by the District as hereinafter provided, and for the purposes stated in this contract, construct in the main stream of the Colorado River at a point in the vicinity of Parker, Arizona, shown on the map attached hereto and described herein as Exhibit A, a dam, referred to herein as the Parker Dam, creating thereby a storage reservoir having a maximum water surface elevation of approximately four hundred fifty (450) feet above sea level. (U. S. Geological Survey datum.) Upon like conditions the United States will also construct outlet works, pressure tunnels, penstocks, and other appurtenant structures to the extent that such structures may be necessary and/or economically

desirable as parts of the original installation, and such facilities for navigation as the Secretary may find necessary. All buildings intended solely for the use of either party hereto shall be constructed at the sole expense of the party for whom such facilities shall be provided. The dam and appurtenant structures shall be so constructed that subsequent installation of diversion or outlet works shall be possible in the most feasible manner for canal connections with lands within the Colorado River Indian Reservation and with public and other lands in Arizona now or hereafter included in projects constructed under the Reclamation Law and supplementary legislation, or otherwise, subject to the consent and approval of the Secretary, and, if either party hereto requires it, so that one-half of the total installed capacity of electrical generating equipment may be located upon the Arizona side of the River and one-half on the California side. Outlet works, pressure tunnels, penstocks, connections for canals and appurtenant structures not required by the district shall be completed under this contract only to the extent necessary to permit their subsequent completion and use without risk or damage to the remainder of the work.

In carrying out the proposed work hereunder and in acquiring supplies, materials, and equipment therefor, the United States may proceed directly under the method commonly referred to as force account, or may proceed by construction contract. In the event that

such contract or contracts shall be let with reference to the construction of said dam, or the acquisition of supplies, materials, or equipment therefor, the letting of such contracts shall be governed by the provisions of section 3709, United States Revised Statutes.

FUNDS TO BE PROVIDED BY THE DISTRICT

11. The district will advance to the United States, not to exceed the sum of thirteen million dollars ($13,000,000), or so much thereof as may be (a) the cost of prepartion of plans and specifications described in article 13 hereof; (b) the actual cost of the said dam, including acquisition of lands and rights of way for reservoir and other incidental purposes, outlet works, pressure tunnels, and penstocks, to be constructed hereunder, and of the district's proportionate share as determined by the Secretary, of such power plant buildings and generating, transforming, and high voltage switching equipment as may be installed for the joint use of the United States and the district and (c) required to meet any overhead and general expense incurred by the United States in carrying out this contract.

Said funds will be furnished to the United States by payment from time to time to the Secretary or such fiscal agent as he may designate in advance of expenditure thereof by the United States. The Secretary will submit estimates of the monthly anticipated expenditures not less than sixty (60) days in advance and the district

will then advance the amount not less than thirty (30) days prior to the month in which such funds shall be estimated to be required. If the United States effects such construction by contract, such contract shall recite that the United States shall not be liable for any loss occasioned by the failure of the district to advance funds as herein provided. The district agrees to hold the United States harmless from all claims whatsoever arising from any such failure. If the funds provided by the district are at any time insufficient, the United States will stop work (if proceeding under force account), when the funds so advanced are exhausted, or give notice to the construction contractor to stop work (if proceeding by construction contract), when the funds so provided are about to be exhausted, and will not resume or give notice to resume work until additional and sufficient funds are provided by the district; and, in any event, the United States shall not be obligated by this agreement beyond the expenditure of the amount actually provided by the district, whether the proposed works are completed or not. The failure of the district to provide funds shall not impose any liability on the district other than to hold the United States harmless from the consequences thereof, but the United States may be relieved, at its option, of any obligation under this contract, if such failure continues for twelve (12) successive months, after submission of estimate therefor, by the Secretary's giving the district written notice of the termination of any further obligation of the United States hereunder.

The cost of the proposed works shall embrace all expense of whatever kind, growing out of or resulting from said works, including any overhead and general expense (as conclusively estimated by the Secretary) incurred by the United States in carrying out this contract. Nothing contained in this article is to be construed as obligating the United States to expend or Congress to appropriate money for any share of (a) said power plant buildings or (b) said generating, transforming and high voltage switching equipment intended for the joint use of the parties hereto.

NO OBLIGATION BY THE UNITED STATES TO PAY FOR WORKS CONSTRUCTED

12. The United States shall not be under any obligation to repay to the district, or otherwise contribute toward, the cost of any works built with funds provided by the district.

PREPARATION OF PLANS AND SPECIFICATIONS

13. The designs and specifications for all construction or other work under this contract (including exploratory and preparatory work) shall be prepared by the United States with the cooperation of and at the cost of the district, and shall be approved in writing by the general manager and chief engineer of the district, or such other officer as the directors thereof may designate, prior to performance thereof or the letting of contracts for such work.

DURATION OF CONTRACT

14. Upon written notice from the district to the Secretary that funds will be available to carry out the work to be constructed hereunder, the United States agrees to submit within thirty (30) days following such notice its first estimate of funds required during the first thirty (30) days of work hereunder and to proceed thereafter with reasonable diligence. It is contemplated that as far as practicable, the proposed works shall be constructed coincidentally with the construction of Hoover Dam and the filling of the reservoir thereby created and that any contract let by the United States for the erection of Parker Dam shall so provide; but neither the United States nor the district shall incur liability to the other through the noncompletion of said works within said period. This contract shall terminate on December 31, 1945, unless prior thereto the district shall have advanced sufficient funds for all works to be constructed by the United States hereunder, and in the event of such termination, all rights of the district under this contract shall cease, and the uncompleted works, together with the rights to the use thereof, shall vest in the United States.

POWER AND OTHER PRIVILEGES

15. I. The interests of both parties require and it is agreed that the water surface of the reservoir to be created by Parker Dam shall be maintained as nearly as possible at a level of 450 feet above sea level (U. S. Geological Survey datum) at the dam.

II. It is agreed that the United States shall have and may exercise the following rights and such incidental authority as may be necessary to make them effective:

(a) The right to control all water passing the dam; provided, however, that the water level stated in article 15 (I) hereof shall not be arbitrarily reduced but may be temporarily reduced from time to time to a minimum elevation of 440 feet above sea level, and the water level shall not be reduced below said minimum level except in cases of emergency affecting the safety of the said dam and appurtenant works.

(b) The right, without contribution to the cost of the dam built under this contract, to one-half the power privilege created thereby for use in the irrigation and drainage of lands in Arizona within the Colorado River Indian Reservation as now constituted and the Gila or Parker-Gila project, as determined by the Secretary and and for other purposes incidental to said Colorado River Indian Reservation and Gila or Parker-Gila project; that is to say, the right to pass through such generating equipment as it may install, one-half the total available flow at the dam at any given time, after deductions for diversions being made above the dam for the district's aqueduct and for the irrigation of (1) the Colorado River Indian Reservation, as now constituted, and (2) public and other lands in Arizona, now are hereafter included in projects constructed under the reclamation law and supple-

mentary legislation, or otherwise, subject to the consent and approval of the Secretary, and the right to so utilize such portion of the balance of the power privilege as aforesaid as may not be used by the district for the time being.

(c) The right to connect with such transmission system as the district may construct for the purpose of utilizing any power transmission capacity in excess of the district's requirements, for the transmission of power from Hoover Dam to Parker Dam for general use within the Colorado River Indian Reservation, as now constituted, and Gila or Parker-Gila project, as determined by the Secretary; provided that such excess capacity shall be subject to reasonable operating conditions fixed by the district, and that the United States shall pay to the district the cost of transmission of such power as may be transmitted by use of such excess capacity hereunder;

(d) The right to connect with Parker Dam and/or the reservoir created thereby by means of a canal (including such outlet and diversion features at Parker Dam as may be necessary or advisable) with lands within the Colorado River Indian Reservation, as now constituted, and with public and other lands in Arizona or California, now or hereafter included in projects constructed under the reclamation law and supplementary legislation, or otherwise, subject to the consent and approval of the Secretary, and the right to thereby divert such quantities

of water as may be consistent with the Colorado River compact and the Boulder Canyon project act.

III. It is agreed that the district shall have and may exercise the following rights and such incidental authority as may be necessary to make them effective:

(a) The right to one-half of the power privilege created by the proposed Parker Dam for the purpose of developing electrical energy for pumping water into and in the said aqueduct and other uses incidental to said aqueduct project in California; that is to say the right to pass through such generating equipment as it may install, one-half the total available flow at the dam at any given time, after deductions for diversions being made above the Dam for the district's aqueduct and for the irrigation of (1) the Colorado River Indian Reservation, as now constituted, and (2) public and other lands in Arizona, now or hereafter included in projects constructed under the reclamation law and supplementary legislation, or otherwise, subject to the consent and approval of the Secretary, and the right to utilize for said purpose such portion of the balance of the power privilege as aforesaid as may not be used by the United States for the time being.

(b) The right to divert water from the said Parker Dam and/or the reservoir created thereby, by means of an aqueduct, canal or other appropriate works (including such outlet and diversion features at Parker Dam as may be necessary or advisable) for domestic, muncipal and

other beneficial use within the area of the district, as now or hereafter constituted, in California, and to thereby divert such quantities of water as may be consistent with the Boulder Canyon project act, the Colorado River compact and the said contracts heretofore entered into between the United States and the district and described and referred to in Article 2 hereof.

INSTALLATION OF MACHINERY

16. Machinery and equipment for generating, transforming, and high voltage switching of energy for the sole use of the district shall be installed, owned and operated by the district at its own expense. The district shall not be liable for the cost of generating or other electrical equipment installed for the sole use of the United States.

OPERATION AND MAINTENANCE OF RESERVOIR, DAM AND OUTLET WORKS

17. The United States will operate and maintain the reservoir, dam and outlet works, to, but not including shut-off valves, and reserves the right to direct the control of all water passing the dam for any and all purposes; provided that contracts now in force between the parties hereto shall not be thereby impaired. So long as the United States shall make no use of the reservoir, the cost of operation and maintenance (which shall include repairs and replacements and a reasonable amount, as determined by the Secretary, for general expenses and over-

head, but excluding contingent liabilities and/or damages) shall be paid monthly in advance by the district to the United States within sixty (60) days of submission of estimates therefor. If and when the United States shall use or authorize the use of said reservoir for diversion of water and/or development of power, the annual cost of maintenance and operation of the reservoir and dam (as hereinabove in this paragraph limited and defined) shall be pro-rated upon the basis of the diversions by each party into their respective aqueducts, canals and power plants, and shall be paid in direct proportion to the use so made by the district and the United States.

OPERATION AND MAINTENANCE OF POWER PLANT AND POWER PLANT BUILDINGS

18. The district will operate and maintain at its own cost all buildings and equipment used solely by it for the generation of electrical energy, from and including shut-off valves. The United States will operate and maintain at its own cost all buildings and equipment used solely by the United States for the generation of electrical energy, subject to the availability of appropriations therefor by Congress, and said operation and maintenance shall be effected by the United States through such agency as the Secretary shall designate.

TITLE

19. Title to the dam and all other structures erected by the United States, whether utilized by it or by the

district, or by both, shall remain in the United States.

UNITED STATES TO BE HELD HARMLESS

20. The district agrees to save the United States, its officers, agents, and employees harmless from all claims whatsoever arising out of the construction and maintenance of said dam, and from all claims whatsoever arising out of such operation thereof as may be necessitated by the requirements of the district. The district agrees to pay all damages resulting from the flooding of lands, and, to the extent that lands within the Chimehuevi Indian Reservation are damaged, payment therefor will be made to the United States for the benefit of said Reservation.

ACCESS TO WORK AND TO BOOKS AND RECORDS

21. Accredited officers of the district shall have the right of ingress to and egress from all work done under this contract, both in progress and after completion, and the right at all reasonable hours to examine and make copies of any books, records, drawings, or specifications thereof; and the United States shall have a like right as to all pertinent books, records, drawings, and specifications of the district. Upon demand and at not less than thirty-day intervals, the United States will furnish to the district detailed statement of all costs and expenditures in connection with and/or chargeable against the proposed Parker Dam project.

EXISTING CONTRACTS BETWEEN THE UNITED STATES AND THE DISTRICT NOT AFFECTED

22. Existing contracts between the United States and the district shall remain in full force and effect and unaltered by the provision of this agreement.

TRANSFER OF INTEREST IN CONTRACT

23. No voluntary transfer of this contract, or of the rights hereunder, shall be made without the written approval of the Secretary; and any successor or assign of the rights of the district, whether by voluntary transfer, or otherwise, shall be subject to all the conditions of the reclamation law and supplementary legislation, and also subject to all the provisions of this contract, to the same extent as though such successor or assign were the original contractor hereunder.

RULES AND REGULATIONS

24. This contract is subject to such rules and regulations, conforming to the reclamation law and supplementary legislation and other statutes cited in this contract, as the Secretary may from time to time promulgate; provided, however, that no right of the district hereunder shall be impaired or obligation of the district hereunder shall be extended thereby; and provided, further, that opportunity for hearing shall be afforded the district by the Secretary prior to promulgation or modification of any such rules and regulations.

25. This contract is made upon the express condition and with the express understanding that all rights hereunder shall be subject to and controlled by the Colorado River compact, being the compact or agreement signed at Santa Fe, New Mexico, November 24, 1922, pursuant to the act Congress approved August 19, 1921, (42 Stat. 171), entitled "An act to permit a compact or agreement between the States of Arizona, California, Colorado, Nevada, New Mexico, Utah, and Wyoming, respecting the disposition and apportionment of the waters of the Colorado River, and for other purposes," which compact was approved in section 13 (a) of the Boulder Canyon project act.

AGREEMENT SUBJECT TO COLORADO RIVER COMPACT

DISPUTES AND DISAGREEMENTS

26. Whenever a controversy arises out of this contract, and if the disputants then agree to submit the matter to arbitration, the district shall name one arbitrator and the Secretary shall name one arbitrator, and the two arbitrators thus chosen shall elect three other arbitrators, but in the event of their failure to name all or any of the three arbitrators within five (5) days after their first meeting, such arbitrators not so elected shall be named by the senior judge of the United States Circuit Court of Appeals for the Ninth Circuit. The decision of any three of such arbitrators shall be a valid and binding award of the arbitrators.

MEMBER OF CONGRESS CLAUSE

27. No member of or Delegate to Congress or Resident Commissioner shall be admitted to any share or part of this contract, or to any benefit that may arise therefrom. Nothing, however, herein contained shall be construed to extend to this contract if made with a corporation for its general benefit.

IN WITNESS WHEREOF, the parties hereto have caused this contract to be executed the day and year first above written.

THE UNITED STATES OF AMERICA,
By RAY LYMAN WILBUR,
Secretary of the Interior.

Attest:
NORTHCUTT ELY.

THE METROPOLITAN WATER DISTRICT
OF SOUTHERN CALIFORNIA,
By W. P. WHITSETT,
Chairman of the Board of Directors.

IN THE

Supreme Court of the United States

October Term, 1934

No. 18 Original

UNITED STATES OF AMERICA
Plaintiff,

vs.

STATE OF ARIZONA
Defendant.

SUPPLEMENTAL AFFIDAVIT OF B. B. MOEUR, GOVERNOR OF ARIZONA, IN OPPOSITION TO THE APPLICATION FOR RESTRAINING ORDER

STATE OF ARIZONA
County of Maricopa } ss.

B. B. Moeur being first duly sworn, deposes and says:

I now am and at all times since January, 1933, have been the duly elected, qualified and acting Governor of the State of Arizona and make this affidavit for and on behalf of said State as defendant in the above entitled cause.

That since my affidavit dated the 30th day of January, 1935, and filed in this Court on or about the 1st day of February, 1935, in opposition to the plaintiff's application for a restraining order, I have obtained from the Secretary of War a photostatic copy of the plans of the Parker Dam, reservoir and appurtenant works as recommended by the Chief of Engineers of the United States Army and approved by the Secretary of War on the 5th day of January, 1935, and from an examination thereof, it appears that no provision is made for the convenient passage of commerce by navigation over or by said dam, and that said dam, if constructed, will be an insuperable obstacle to navigation on the Colorado River between points above and points below its location.

Subsequent to the 30th day of January, 1935, there has also come into my possession from the Department of the Interior what purports to be a full, true and correct copy of the alleged contract dated February 10th, 1933, between the United States of America, acting by and through the Secretary of the Interior, and the Metropolitan Water District of Southern California (mentioned and referred to in Paragraph X of the Bill of Complaint), under the terms of which it is alleged the plaintiff is obligated to construct Parker Dam, reservoir and appurtenant works; that I am advised by counsel, and upon such information state, that contrary to the allegations in the Bill of Complaint, said contract does not purport to obligate the United States to construct said dam for the purpose of improving navigation, nor does it obligate the United States to maintain and operate said dam, res-

ervoir or appurtenant works other than at the cost and expense of the Metropolitan Water District until such time as and when the United States may make joint use, for its own account, of said structures, whereupon and thereafter the cost of such operation and maintenance is to be borne jointly by the United States and the Metropolitan Water District in proportion to their respective uses.

I am further advised by counsel, and so state, that said contract shows upon its face that said dam, reservoir and appurtenant works are to be built for the primary use and benefit of the Metropolitan Water District of Southern California for the desilting and use of the waters of the Colorado River for the generation of power and the diversion of approximately 1,000,000 acre-feet of said waters per year to the coastal plain of Southern California for municipal, domestic and other beneficial uses.

There is attached to this affidavit as "Exhibit A" a true and correct copy of said contract so furnished by the Department of the Interior.

IN WITNESS WHEREOF, I have hereunto set my hand this 16th day of February, 1935.

B. B. MOEUR

Subscribed and sworn to before me this 16th day of February, A. D. 1935.

ETHEL McMURCHIE,
Notary Public.

My commission expires January 21, 1936.
(Notarial Seal)

EXHIBIT "A"

COOPERATIVE CONTRACT FOR CONSTRUCTION AND OPERATION OF PARKER DAM

Article

1. Preamble.
2-9. Explanatory recitals.
10. Construction by the United States.
11. Funds to be provided by the district.
12. No obligation by the United States to pay for works constructed.
13. Preparation of plans and specifications.
14. Duration of contract.
15. Power and other privileges.
16. Installation of Machinery.
17. Operation and maintenance of reservoir, dam, and outlet works.
18. Operation and maintenance of power plant and power-plant buildings.
19. Title.
20. United States to be held harmless.
21. Access to work and to books and records.
22. Existing contracts between the United States and the district not affected.
23. Transfer of interest in contract.
24. Rules and regulations.
25. Agreement subject to Colorado River compact.
26. Disputes and disagreements.
27. Member of Congress clause.

COOPERATIVE CONTRACT FOR CONSTRUCTION AND OPERATION OF PARKER DAM

1. This contract, made this 10th day of February, 1933, pursuant to the act of Congress approved June 17, 1902 (32 Stat. 388), and acts amendatory thereof or suplementary thereto, all of which acts are commonly known and referred to as the reclamation law, and particularly pursuant to the act of Congress approved March 4, 1921 (41 Stat. 1367, 1404), section 25 of the act of Congress approved April 21, 1904 (33 Stat. 189, 224), and the act of Congress approved December 21, 1928 (45 Stat. 1057), designated the Boulder Canyon project act, and the Metropolitan Water District act of the Legislature of the State of California (Stats. 1927, chap. 429), as amended, particularly section 5, subdivision (9) thereof, between the United States of America, hereinafter referred to as the United States, acting for that purpose by Ray Lyman Wilbur, Secretary of the Interior, hereinafter styled the Secretary, and the Metropolitan Water District of Southern California, a public corporation, hereinafter referred to as the District, organized and existing under and by virtue of the laws of the State of California.

Witnesseth:

EXPLANATORY RECITALS

2. Whereas, these parties have heretofore on April 24, 1930, and September 28, 1931, entered into two contracts entitled respectively "Contract for Delivery of Water" and "Supplementary Contract for Delivery

of Water," which said contracts provide, among other things, for the delivery by the United States to the district each year from the Boulder Canyon Reservoir of quantities of water at a point in the Colorado River immediately above the district's point of diversion (at or in the vicinity of the proposed Parker Dam hereinafter referred to), and have also entered into two contracts (dated April 26, 1930, and May 31, 1930), for the purchase by the district from the United States of certain quantities of electrical energy to be generated at Hoover Dam, for the pumping of said water into and in an aqueduct to be constructed by the district; and

3. Whereas, the said point of delivery and the proposed Parker Dam are approximately ten (10) miles above the boundaries of the Colorado River Indian Reservation as designated by the act of Congress approved March 3, 1865 (13 Stat. 559), and there are now being irrigated, by pumping, approximately 6,000 acres of land within said reservation, and water has been reserved and appropriated pursuant to said act as amended or supplemented and particularly by the act of April 4, 1910 (36 Stat. 273), for additional lands within said reservation susceptible of irrigation from the Colorado River, the reclamation of which will require diversion from the river by construction of a dam, or by pumping or both, and will require drainage of said lands by pumping, for all of which electrical energy is needed; and

4. Whereas, there are also in Arizona, additional public and other lands in the vicinity of said reserva-

tion and also in the Gila Valley susceptible of irrigation from the Colorado River, but requiring pumping for such purposes, for which electrical energy will be needed, and the United States has now under way an investigation of possible reclamation of such areas as authorized by section fifteen (15) of the said Boulder Canyon project act; and

5. Whereas, the reclamation of said Indian and public and other lands will be rendered more feasible by the availability of stored water and electrical energy at the proposed Parker Dam, and the floods of the tributaries of the Colorado River between Hoover Dam and Parker Dam will be controlled, and navigation improved, by said dam; and

6. Whereas, the Secretary is authorized by said act of April 21, 1904 (33 Stat. 224), to build the proposed Parker Dam for the reclamation of all or any portion of the irrigable lands on the Yuma and Colorado River Indian Reservations in California and Arizona; and such authority has been reserved in the Arizona enabling act (act of June 20, 1910, 36 Stat. 570, 575), and

7. Whereas, the district is engaged in a project involving the construction of an aqueduct for the purpose of diverting and conveying water from the Colorado River to the metropolitan area of Southern California for domestic, municipal and other useful purposes, and as a means of such diversion, desire storage in the main stream of the Colorado River at the site of the proposed Parker Dam, for the purpose, among

others, of desilting water, reducing pump lift and developing incidental electrical energy for pumping water into and in said aqueduct and other uses subordinate to the said aqueduct project, and the district desires to utilize the proposed Parker Dam in common with the United States and is willing to pay to the United States the entire capital cost of construction of said dam, as hereinafter set forth, and is further willing that one-half of the power privilege created by said dam shall be reserved to the United States for the purposes of irrigation and drainage of lands in Arizona within the Colorado River Indian Reservation, as now constituted, and the Gila or Gila-Parker project, without contribution by the United States to the capital cost of the proposed dam, as hereinafter set forth, and is also willing that the dam be utilized by the United States for the storage and diversion of water for the requirements of Indian, public, and other lands in Arizona; and

8. Whereas, the Secretary is authorized by the act of Congress approved March 4, 1921, to receive moneys from the district as aforesaid and to effect therewith the construction of the proposed works as though said moneys were specifically appropriated for said purposes; and

9. Whereas, funds are not otherwise available for the construction by the United States of said dam and the provision of storage and diversion facilities and of appurtenant works for the irrigation and drainage of said Indian, public, and other lands in Arizona and the cooperative construction of the said dam and

works, as herein provided, will be mutually advantageous to the parties hereto, and the cost of said dam and appurtenant works will be materially less if constructed during the period of completion of the Hoover Dam now under construction than would otherwise be the case;

Now, therefore, in consideration of the mutual covenants herein contained, the parties hereto agree as follows, to wit:

CONSTRUCTION BY THE UNITED STATES

10. The United States will, with funds advanced by the District as hereinafter provided, and for the purposes stated in this contract, construct in the main stream of the Colorado River at a point in the vicinity of Parker, Arizona, shown on the map attached hereto and described herein as Exhibit A, a dam, referred to herein as the Parker Dam, creating thereby a storage reservoir having a maximum water surface elevation of approximately four hundred fifty (450) feet above sea level. (U. S. Geological Survey datum.) Upon like conditions the United States will also construct outlet works, pressure tunnels, penstocks, and other appurtenant structures to the extent that such structures may be necessary and/or economically desirable as parts of the original installation, and such facilities for navigation as the Secretary may find necessary. All buildings intended solely for the use of either party hereto shall be constructed at the sole expense of the party for whom such facilities shall be provided. The dam and appurtenant structures shall

be so constructed that subsequent installation of diversion or outlet works shall be possible in the most feasible manner for canal connections with lands within the Colorado River Indian Reservation and with public and other lands in Arizona now or hereafter included in projects constructed under the Reclamation Law and supplementary legislation, or otherwise, subject to the consent and approval of the Secretary, and, if either party hereto requires it, so that one-half of the total installed capacity of electrical generating equipment may be located upon the Arizona side of the River and one-half on the California side. Outlet works, pressure tunnels, penstocks, connections for canals and appurtenant structures not required by the district shall be completed under this contract only to the extent necessary to permit their subsequent completion and use without risk or damage to the remainder of the work.

In carrying out the proposed work hereunder and in acquiring supplies, materials, and equipment therefor, the United States may proceed directly under the method commonly referred to as force account, or may proceed by construction contract. In the event that such contract or contracts shall be let with reference to the construction of said dam, or the acquisition of supplies, materials, or equipment therefor, the letting of such contracts shall be governed by the provisions of section 3709, United States Revised Statutes.

FUNDS TO BE PROVIDED BY THE DISTRICT

11. The district will advance to the United States, not to exceed the sum of thirteen million dollars ($13,-

000,000), or so much thereof as may be (a) the cost of preparation of plans and specifications described in article 13 hereof; (b) the actual cost of the said dam, including acquisition of lands and rights of way for reservoir and other incidental purposes, outlet works, pressure tunnels, and penstocks, to be constructed hereunder, and of the district's proportionate share as determined by the Secretary, of such power plant buildings and generating, transforming, and high voltage switching equipment as may be installed for the joint use of the United States and the district, and (c) required to meet any overhead and general expense incurred by the United States in carrying out this contract.

Said funds will be furnished to the United States by payment from time to time to the Secretary or such fiscal agent as he may designate in advance of expenditure thereof by the United States. The Secretary will submit estimates of the monthly anticipated expenditures not less than sixty (60) days in advance and the district will then advance the amount not less than thirty (30) days prior to the month in which such funds shall be estimated to be required. If the United States effects such construction by contract, such contract shall recite that the United States shall not be liable for any loss occasioned by the failure of the district to advance funds as herein provided. The district agrees to hold the United States harmless from all claims whatsoever arising from any such failure. If the funds provided by the district are at any time insufficient, the United States will stop work (if proceeding under force account), when the funds so

advanced are exhausted, or give notice to the construction contractor to stop work (if proceeding by construction contract), when the funds so provided are about to be exhausted, and will not resume or give notice to resume work until additional and sufficient funds are provided by the district; and, in any event, the United States shall not be obligated by this agreement beyond the expenditure of the amount actually provided by the district, whether the proposed works are completed or not. The failure of the district to provide funds shall not impose any liability on the district other than to hold the United States harmless from the consequences thereof, but the United States may be relieved, at its option, of any obligation under this contract, if such failure continues for twelve (12) successive months, after submission of estimate therefor, by the Secretary's giving the district written notice of the termination of any further obligation of the United States hereunder.

The cost of the proposed works shall embrace all expense of whatever kind, growing out of or resulting from said works, including any overhead and general expense (as conclusively estimated by the Secretary) incurred by the United States in carrying out this contract. Nothing contained in this article is to be construed as obligating the United States to expend or Congress to appropriate money for any share of (a) said power plant buildings or (b) said generating, transforming and high voltage switching equipment intended for the joint use of the parties hereto.

NO OBLIGATION BY THE UNITED STATES TO PAY FOR WORKS CONSTRUCTED

12. The United States shall not be under any obligation to repay to the district, or otherwise contribute toward, the cost of any works built with funds provided by the district.

PREPARATION OF PLANS AND SPECIFICATIONS

13. The designs and specifications for all construction or other work under this contract (including exploratory and preparatory work) shall be prepared by the United States with the cooperation of and at the cost of the district, and shall be approved in writing by the general manager and chief engineer of the district, or such other officer as the directors thereof may designate, prior to performance thereof or the letting of contracts for such work.

DURATION OF CONTRACT

14. Upon written notice from the district to the Secretary that funds will be available to carry out the work to be constructed hereunder, the United States agrees to submit within thirty (30) days following such notice its first estimate of funds required during the first thirty (30) days of work hereunder and to proceed thereafter with reasonable diligence. It is contemplated that as far as practicable, the proposed works shall be constructed coincidentally with the construction of Hoover Dam and the filling of the

reservoir thereby created and that any contract let by the United States for the erection of Parker Dam shall so provide; but neither the United States nor the district shall incur liability to the other through the noncompletion of said works within said period. This contract shall terminate on December 31, 1945, unless prior thereto the district shall have advanced sufficient funds for all works to be constructed by the United States hereunder, and in the event of such termination, all rights of the district under this contract shall cease, and the uncompleted works, together with the rights to the use thereof, shall vest in the United States.

POWER AND OTHER PRIVILEGES

15. I. The interests of both parties require and it is agreed that the water surface of the reservoir to be created by Parker Dam shall be maintained as nearly as possible at a level of 450 feet above sea level (U. S. Geological Survey datum) at the dam.

II. It is agreed that the United States shall have and may exercise the following rights and such incidental authority as may be necessary to make them effective:

(a) The right to control all water passing the dam; provided, however, that the water level stated in article 15 (I) hereof shall not be arbitrarily reduced but may be temporarily reduced from time to time to a minimum elevation of 440 feet above sea level, and the water level shall not be reduced below said mini-

mum level except in cases of emergency affecting the safety of the said dam and appurtenant works.

(b) The right, without contribution to the cost of the dam built under this contract, to one-half the power privilege created thereby for use in the irrigation and drainage of lands in Arizona within the Colorado River Indian Reservation as now constituted and the Gila or Parker-Gila project, as determined by the Secretary and for other purposes incidental to said Colorado River Indian Reservation and Gila or Parker-Gila project; that is to say, the right to pass through such generating equipment as it may install, one-half the total available flow at the dam at any given time, after deductions for diversions being made above the dam for the district's aqueduct and for the irrigation of (1) the Colorado River Indian Reservation, as now constituted, and (2) public and other lands in Arizona, now or hereafter included in projects constructed under the reclamation law and supplementary legislation, or otherwise, subject to the consent and approval of the Secretary, and the right to so utilize such portion of the balance of the power privilege as aforesaid as may not be used by the district for the time being,

(c) The right to connect with such transmission system as the district may construct for the purpose of utilizing any power transmission capacity in excess of the district's requirements, for the transmission of power from Hoover Dam to Parker Dam for general use within the Colorado River Indian Reservation, as now constituted, and Gila or Parker-Gila

project, as determined by the Secretary; provided that such excess capacity shall be subject to reasonable operating conditions fixed by the district, and that the United States shall pay to the district the cost of transmission of such power as may be transmitted by use of such excess capacity hereunder;

(d) The right to connect with Parker Dam and/or the reservoir created thereby by means of a canal (including such outlet and diversion features at Parker Dam as may be necessary or advisable) with lands within the Colorado River Indian Reservation, as now constituted, and with public and other lands in Arizona or California, now or hereafter included in projects constructed under the reclamation law and supplementary legislation, or otherwise, subject to the consent and approval of the Secretary, and the right to thereby divert such quantities of water as may be consistent with the Colorado River compact and the Boulder Canyon project act.

III. It is agreed that the district shall have and may exercise the following rights and such incidental authority as may be necessary to make them effective:

(a) The right to one-half of the power privilege created by the proposed Parker Dam for the purpose of developing electrical energy for pumping water into and in the said aqueduct and other uses incidental to said aqueduct project in California; that is to say the right to pass through such generating equipment as it may install, one-half the total available flow at the dam at any given time, after deductions for diver-

sions being made above the dam for the district's aqueduct and for the irrigation of (1) the Colorado River Indian Reservation, as now constituted, and (2) public and other lands in Arizona, now or hereafter included in projects constructed under the reclamation law and supplementary legislation, or otherwise, subject to the consent and approval of the Secretary, and the right to utilize for said purpose such portion of the balance of the power privilege as aforesaid as may not be used by the United States for the time being.

(b) The right to divert water from the said Parker Dam and/or the reservoir created thereby, by means of an aqueduct, canal or other appropriate works (including such outlet and diversion features at Parker Dam as may be necessary or advisable) for domestic, municipal and other beneficial use within the area of the district, as now or hereafter constituted, in California, and to thereby divert such quantities of water as may be consistent with the Boulder Canyon project act, the Colorado River compact and the said contracts heretofore entered into between the United States and the district and described and referred to in Article 2 hereof.

INSTALLATION OF MACHINERY

16. Machinery and equipment for generating, transforming, and high voltage switching of energy for the sole use of the district shall be installed, owned and operated by the district at its own expense. The district shall not be liable for the cost of generating

or other electrical equipment installed for the sole use of the United States.

OPERATION AND MAINTENANCE OF RESERVOIR, DAM AND OUTLET WORKS

17. The United States will operate and maintain the reservoir, dam and outlet works, to, but not including shut-off valves, and reserves the right to direct the control of all water passing the dam for any and all purposes; provided that contracts now in force between the parties hereto shall not be thereby impaired. So long as the United States shall make no use of the reservoir, the cost of operation and maintenance (which shall include repairs and replacements and a reasonable amount, as determined by the Secretary, for general expenses and overhead, but excluding contingent liabilities and/or damages) shall be paid monthly in advance by the district to the Unted States within sixty (60) days of submission of estimates therefor. If and when the United States shall use or authorize the use of said reservoir for diversion of water and/or development of power, the annual cost of maintenance and operation of the reservoir and dam (as hereinabove in this paragraph limited and defined) shall be pro-rated upon the basis of the diversions by each party into their respective aqueducts, canals and power plants, and shall be paid in direct proportion to the uses so made by the district and the United States.

OPERATION AND MAINTENANCE OF POWER PLANT AND POWER PLANT BUILDINGS

18. The district will operate and maintain at its own cost all buildings and equipment used solely by it for the generation of electrical energy, from and including shut-off valves. The United States will operate and maintain at its own cost all buildings and equipment used solely by the United States for the generation of electrical energy, subject to the availability of appropriations therefor by Congress, and said operation and maintenance shall be effected by the United States through such agency as the Secretary shall designate.

TITLE

19. Title to the dam and all other structures erected by the United States, whether utilized by it or by the district, or by both, shall remain in the United States.

UNITED STATES TO BE HELD HARMLESS

20. The district agrees to save the United States, its officers, agents, and employees harmless from all claims whatsoever arising out of the construction and maintenance of said dam, and from all claims whatsoever arising out of such operation thereof as may be necessitated by the requirements of the district. The district agrees to pay all damages resulting from the flooding of lands, and, to the extent that lands within the Chimehuevi Indian Reservation are dam-

aged, payment therefor will be made to the United States for the benefit of said Reservation.

ACCESS TO WORK AND TO BOOKS AND RECORDS

21. Accredited officers of the district shall have the right of ingress to and egress from all work done under this contract, both in progress and after completion, and the right at all reasonable hours to examine and make copies of any books, records, drawings, or specifications thereof; and the United States shall have a like right as to all pertinent books, records, drawings, and specifications of the district. Upon demand and at not less than thirty-day intervals, the United States will furnish to the district detailed statement of all costs and expenditures in connection with and/or chargeable against the proposed Parker Dam project.

EXISTING CONTRACTS BETWEEN THE UNITED STATES AND THE DISTRICT NOT AFFECTED

22. Existing contracts between the United States and the district shall remain in full force and effect and unaltered by the provision of this agreement.

TRANSFER OF INTEREST IN CONTRACT

23. No voluntary transfer of this contract, or of the rights hereunder, shall be made without the written approval of the Secretary; and any successor or assign of the rights of the district, whether by volun-

tary transfer, or otherwise, shall be subject to all the conditions of the reclamation law and supplementary legislation, and also subject to all the provisions of this contract, to the same extent as though such successor or assign were the original contractor hereunder.

RULES AND REGULATIONS

24. This contract is subject to such rules and regulations, conforming to the reclamation law and supplementary legislation and other statutes cited in this contract, as the Secretary may from time to time promulgate; provided, however, that no right of the district hereunder shall be impaired or obligation of the district hereunder shall be extended thereby; and provided, further, that opportunity for hearing shall be afforded the district by the Secretary prior to promulgation or modification of any such rules and regulations.

AGREEMENT SUBJECT TO COLORADO RIVER COMPACT

25. This contract is made upon the express condition and with the express understanding that all rights hereunder shall be subject to and controlled by the Colorado River compact, being the compact or agreement signed at Santa Fe, New Mexico, November 24, 1922, pursuant to the act of Congress approved August 19, 1921 (42 Stat. 171), entitled "An act to permit a compact or agreement between the States of Arizona, California, Colorado, Nevada, New Mexico, Utah, and

Wyoming, respecting the disposition and apportionment of the waters of the Colorado River, and for other purposes," which compact was approved in section 13 (a) of the Boulder Canyon project act.

DISPUTES AND DISAGREEMENTS

26. Whenever a controversy arises out of this contract, and if the disputants then agree to submit the matter to arbitration, the district shall name one arbitrator and the Secretary shall name one arbitrator, and the two arbitrators thus chosen shall elect three other arbitrators, but in the event of their failure to name all or any of the three arbitrators within five (5) days after their first meeting, such arbitrators not so elected shall be named by the senior judge of the United States Circuit Court of Appeals for the Ninth Circuit. The decision of any three of such arbitrators shall be a valid and binding award of the arbitrators.

MEMBER OF CONGRESS CLAUSE

27. No member of or Delegate to Congress or Resident Commissioner shall be admitted to any share or part of this contract, or to any benefit that may arise therefrom. Nothing, however, herein contained shall be construed to extend to this contract if made with a corporation for its general benefit.

IN WITNESS WHEREOF, the parties hereto have caused this contract to be executed the day and year first above written.

THE UNITED STATES OF AMERICA,

By RAY LYMAN WILBUR,
Secretary of the Interior.

Attest:

NORTHCUTT ELY.

THE METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA,

By W. P. WHITSETT,
Chairman of the Board of Directors.

No. 18 ORIGINAL

In the Supreme Court
OF THE
United States

October Term, 1934

UNITED STATES OF AMERICA,
Plaintiff,

vs.

STATE OF ARIZONA,
Defendant.

DEFENDANT'S MOTION FOR LEAVE TO FILE REPLY BRIEF

Defendant respectfully shows unto the Court that it was not until March 18, 1935, that it received copy of plaintiff's brief in the above entitled cause in support of its application for a restraining order and in opposition to defendant's motion to dismiss the bill of complaint, notwithstanding the fact that said brief was filed with the Clerk of this Court prior to date of argument. Defendant, therefore, was not advised of the Government's points and authorities when the case was argued.

WHEREFORE, it prays leave to file the accompanying brief in reply.

JOHN L. SULLIVAN,
Attorney General,

JAMES R. MOORE,
Special Assistant Attorney General.
Solicitors for Defendant.

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No. 18 Original

In the Supreme Court
OF THE
United States

October Term, 1934

UNITED STATES OF AMERICA,
Plaintiff,

vs.

STATE OF ARIZONA,
Defendant.

DEFENDANT'S REPLY BRIEF

ARGUMENT

Summary

1. The contract between the United States and the Metropolitan Water District (Governor Moeur's Supplemental Affidavit, Appendix to Answer and Appendix to Plaintiff's Brief) shows that Parker Dam may not be used for either flood control or reregulation of water discharged from Boulder Canyon Reservoir.

2. The United States not having complied with the laws of Arizona in reference to the appropriation of water, it is prohibited from diverting water from the Colorado River in carrying out the provisions of the Reclamation Law.

3. As Arizona became vested with title to the waters and the bed and banks of the Colorado River, a navigable stream, as an attribute of sovereignty, as distinguished from a grant from Congress, upon its admission to the Union on an equal basis with the original thirteen states, Congress had no constitutional power to reserve any right, title or easement therein.

I.

PARKER RESERVOIR NOT AVAILABLE FOR FLOOD CONTROL OR REREGULATION OF WATER DISCHARGED FROM BOULDER RESERVOIR.

The Government's brief lays great stress upon the adaptability of Parker Reservoir to control floods between Boulder Dam and Parker Dam and to reregulate discharge of water from Boulder Reservoir, which it asserts will improve navigation.

An analysis of the contract between The Metropolitan Water District and the Government discloses:

1. That the storage reservoir to be created by Parker Dam will have a maximum water surface elevation of approximately 450 feet above sea level (Contract, Article 10).

2. That the interest of both the Water District and the Government require that the water surface of the reservoir be maintained as nearly as possible at the level of 450 feet above sea level (Contract, Article 15, I.).

3. That the water level stated in Article 15 (I) viz., 450 above sea level, may not be arbitrarily reduced by the Government, but may be temporarily reduced from time to time to a minimum of 440 feet above sea level.

Therefore, if the maximum water elevation, (crest of dam) is 450 feet, which it is agreed shall be maintained as nearly as possible, there is no reserved storage by which either floods may be controlled or the discharge of water from Boulder Dam reregulated. All floods originating about the Dam and all excess discharges from Boulder Reservoir will necessarily pass over the crest of the Dam, if the water elevation is maintained, as provided in the contract, at its maximum elevation of 450 feet above sea level. It is, therefore, apparent that the parties to the contract have in mind the maintaining of a high head of water for the generation of the maximum amount of power, rather than providing reserve storage for flood control or reregulation of water discharged from the Boulder Reservoir.

II.

THE UNITED STATES IS WITHOUT AUTHORITY TO DIVERT WATER FROM COLORADO RIVER FOR RECLAMATION OF PUBLIC AND INDIAN LANDS WITHOUT PERMIT FROM THE STATE OF ARIZONA.

The Bill of Complaint does not allege that the Secretary of the Interior has obtained a permit from the State Water Commissioner to appropriate the water which he proposes to divert at Parker Dam.

Article I of Chapter 81, Revised Code of Arizona, 1928, embodies the State Water Code, under the provisions of which it is required that a permit must be obtained from the State Water Commissioner before any water is appropriated.

Section 3315 makes it a misdemeanor for any person to "without authority divert water from a stream."

The Act of Congress of June 17, 1902 (c. 1093, Sec. 8, 32 Stat. 390), U. S. C. A. 383, Title 43, reads as follows:

> "Section 383. **Vested rights and State laws unaffected by chapter.** Nothing in this chapter (Reclamation Law), shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder, and the Secretary of the Interior, in carrying out the provisions of this chapter, shall proceed in conformity with such laws, and nothing herein shall in any way affect any right of any State or of the Federal Government or of any landowner, appropriator, or user of water in, to, or from any interestate stream or the waters thereof."

In *Burley v. United States*, 179 Fed. 1 (C. C. A. 9), it was held that the foregoing section not only recognizes the constitution and laws of the state providing for the

appropriation of its waters and the reclamation of its arid lands, but that it requires the Secretary of the Interior in carrying out the provisions of the Reclamation Law to proceed in conformity with the laws of the state regulating the appropriation of water.

In the recent case of *In re Determination of Relative Rights to Use of Waters of Pantano Creek in Pima County, Tattersfield v. Putman*, 41 Pac. (2d) 228, decided by the Supreme Court of Arizona, February 11, 1935, which was not available at the time Arizona's Motion to Dismiss and supporting brief were prepared, it was held that after the adoption of the Water Code, supra, in 1919,

> "it was no longer possible to appropriate water under the law of Arizona for the purpose of irrigation by its mere beneficial user for that purpose upon land. Certain formalities were required to initiate and perfect the right. It does not appear from the record that these formalities were ever complied with so far as the Monthan land was concerned. We are therefore of the opinion that no right to the use of water for that land has ever been legally acquired by any one."

Included among the formalities required are an application by the proposed appropriator and the granting of a permit to divert and appropriate water by the State Water Commissioner.

Prior to this decision, it had been the general opinion of the profession in Arizona that an appropriation could

be lawfully made in this State by actual diversion and beneficial use, notwithstanding the provisions of the Water Code; that the only advantage which could accrue by a compliance with the provisions of the Water Code would be the benefit of the doctrine of relation, which would fix the date of the priority as of the date of the filing of the application for a permit to appropriate, instead of as of the date of actual diversion of the water and its application for a beneficial use.

If the United States is proceeding under the Reclamation Law, it is required by the provisions of the Act of Congress of June 17, 1902, supra, to proceed in conformity with the State Water Code, all the formalities of which, in turn, must be complied with before a legal right to appropriate and divert water can be obtained by any person, including the Government. We, therefore, advance the proposition that the State of Arizona was acting within the scope of its legal rights when it forcibly prevented the Secretary of the Interior from diverting water from the Colorado River for the irrigation of public and Indian lands, independently of its right to repel the trespass upon its fee at the site of the Dam and within the flood lines of the Reservoir, and to prevent an unlawful obstruction to navigation by the Secretary of the Interior while acting as the agent and contractor of The Metropolitan Water District.

III.

THE UNITED STATES CAN ASSERT NO RIGHTS TO BUILD DAM UNDER PARAGRAPH 7, SEC-

TION 20 OF THE ACT ADMITTING ARIZONA AS A STATE.

On page 25 of the Government's brief it cites and quotes from *Stearns v. Minnesota*, 179 U. S. 223, 45 Law Ed. 162, where the court makes a distinction between attempted compacts in enabling acts relating (a) to political rights and obligations of the new state, and (b) to property belonging to the United States or to the anticipated new state. The court points out that the former can not be restricted by compact, while the latter is a proper subject of contract between the Federal Government and the new state.

The Government takes the position that the reservation in the Arizona Enabling Act to the effect that the Government may carry out the terms of the Reclamation Law as fully as though Arizona had continued to be a territory, had to do with property rights and not with political rights and obligations.

The provision in the Minnesota Enabling Act considered in the Stearns case was one by which the Federal Government, by an Act of Congress, donated to the state of Minnesota large areas of the public domain, subject to certain restrictions with reference to disposition and taxation. The Federal Government owning the public domain in fee in its proprietary capacity, had a perfect right to either withhold or donate the lands to Minnesota, and if donated, to attach whatever conditions it fancied, and Minnesota only obtained such title as the Act of Congress bestowed upon it.

On the other hand, the Federal Government, owned the waters, beds and banks of navigable streams prior to statehood in its sovereign capacity in trust for the use and benefit of future states, if, as and when created, and title thereto vests in the new states by the mere fact of succeeding to the sovereignty of the Federal Government. *Pollard, et al, v. Hagan, et al,* 3 Howard 212, 11 Law Ed. 565.

The waters, beds and banks of navigable rivers do not pass from the Federal Government to a new state by grant, but as an attribute of sovereignty.

The Act admitting Alabama as a state contained a provision to the effect that upon admission, the people of Alabama disclaimed all right or title to the waste or unappropriated lands lying within the state, and that the same should remain at the sole disposal of the United States.

Pollard v. Hagan, supra, was a suit in ejectment, involving the title to land between the high and low water lines of the Mobile River, a navigable stream, the plaintiff claiming under a patent from the United States and an Act of Congress confirming the same, and the defendant claiming under a patent from the state of Alabama. No question was raised as to whether or no the land involved fell within the broad definition of "waste and unappropriated lands", which were reserved to the United States in the Enabling Act. It was held that Congress was without authority to reserve to the United States title to the land in question. The opinion concludes with the following language:

"This right of eminent domain over the shores and the soils under the navigable waters, for all municipal purposes, belongs exclusively to the States within their respective territorial jurisdictions, and they, and they only, have the constitutional power to exercise it. To give to the United States the right to transfer to a citizen the title to the shores and the soils under the navigable waters, would be placing in their hands a weapon which might be wielded greatly to the injury of State sovereignty, and deprived the States of the power to exersice a numerous and important class of police powers. But in the hands of the States this power can never be used so as to affect the exercise of any national right of eminent domain or jurisdiction with which the United States have been invested by the Constitution. For, although the territorial limits of Alabama have extended all her sovereign power into the sea, it is there, as on the shore, but municipal power, subject to the Constitution of the United States, 'and the laws which shall be made in pursuance thereof.'

"By the preceding course of reasoning we have arrived at these general conclusions: First. The shores of navigable waters, and the soils under them, were not granted by the Constitution to the United States, but were reserved to the States respectively. Second. The new States have the same rights, sovereignty, and jurisdiction over this subject as the original States. Third. The right of the United States to the public lands, and the power of Congress to make all needful rules and regulations for the sale and disposition thereof, conferred no power to grant to the plaintiffs the land in controversy in this case."

If Congress, in providing for the admission of a new state, cannot reserve the fee to the bed and banks of navigable streams, we know of no principle of law which will permit it to reserve a lesser estate in the nature of an easement.

We wish again to state that Arizona does not question the general power of Congress to reclaim, by irrigation or otherwise, public and Indian lands, but we do earnestly question its right to appropriate to its own use the bed and banks of the Colorado River, the property of Arizona held in its sovereign capacity, without the state's consent, for any purpose whatsoever, other than the primary one of improving navigation, while acting in its governmental, as distinguished from its proprietary capacity.

While Congress has the power to pay off the national debt, it has not the constitutional authority to appropriate one acre of land of the state of Arizona for that purpose without the state's consent, although it might be sufficient to discharge in full every obligation owed by the Federal government. The same principle applies to appropriating property of the state to its own use in aid of reclamation of public and Indian lands.

The Government also makes the point that Section 9 of the Rivers and Harbors Appropriation Act of 1899 (c. 425, 30 Stat. 1151), prohibiting the construction of any dam across a navigable stream without the consent of Congress, has no application to a dam being built by the Government itself. We concede this point so far as it applies to a dam being built under authority of Con-

gress, pursuant to the commerce clause of the Constitution for the purpose of improving navigation. However, that it not the situation presented by this case.

Here the Government is acting as a contractor *for profit* for The Metropolitan Water District of Southern California and no Government funds are being expended. While it is true that the Government's profit does not accrue in dollars and cents, the contract provides that it shall receive (really for the mere use of its name) title to the dam, estimated to cost $13,000,000, and the free use of 42,500 firm continuous hydro-electric power of a present capitalized estimated switch-board value of some $12,000,000, making a total profit of $25,000,000 for acting as a buffer between the Water District on one hand and the State of Arizona and the Congress of the United States on the other.

The Secretary of the Interior, acting for his principal, The Metropolitan Water District, in the construction of the dam, must necessarily show the authority of the principal to do that which the Secretary has undertaken to do for and on its behalf. It would seem that the contractor's rights and authority in the premises would not be greater than those of his principal.

The Government makes the further point that Section 202 of the National Industrial Recovery Act authorizes the Administrator of Public Works to adopt a comprehensive plan of public works, including river and harbor improvements, the latter being subject to the approval

of Congress or the Chief of Engineers of the Army; that the Administrator has included Parker Dam in his program of public works, and that the same has been approved by the Chief of Engineers and the Secretary of War.

We submit that said Section 202 only contemplated public works being constructed from funds appropriated by Congress, and that no bridge, dam or dike can lawfully be built in, upon or across a navigable stream by the Public Works Administrator, even with funds appropriated by Congress, without an approving Act of Congress; the approval of the Chief of Engineers and the Secretary of War not being sufficient for such structures. It was never contemplated by said section that a corporation or individual might circumvent the laws of Congress, obstruct navigation, and appropriate to its own use the beds and banks of a navigable stream without the state's consent simply by procuring the Secretary of the Interior as a contractor to construct the works; and this regardless of whatever profit, direct or indirect, tangible or intangible, that might accrue to the United States as a contractor.

The Government makes the further point that inasmuch as the bill alleges that the dam will improve navigation, the motion to dismiss admits that allegation to be a fact. The motion to dismiss is addressed to the entire bill, which we submit negatives the allegations of river improvement. The bill contains something in the

nature of a negative pregnant. While both the bill and the Government's brief contain lip service to navigation, the undisputed allegations in the bill that the dam across the river will be 72 feet high and extend from bank to bank and the express provisions of the contract requiring the water in the reservoir to be maintained at an elevation of 450 feet above sea level (the crest of the dam) all negative the allegations and argument directed to the improvement of navigation, flood control and the reregulation of the discharge of water from Boulder Dam.

Respectfully submitted,

JOHN L. SULLIVAN,
Attorney General,

JAMES R. MOORE,
Special Assistant Attorney General.
Solicitors for Defendant.
Phoenix, Arizona.

In the Supreme Court of the United States

OCTOBER TERM, 1934

No. 18, ORIGINAL

THE UNITED STATES OF AMERICA, PLAINTIFF

v.

THE STATE OF ARIZONA, DEFENDANT

APPLICATION FOR AN ORDER TO SHOW CAUSE WHY A RESTRAINING ORDER SHOULD NOT ISSUE

Comes now the United States, plaintiff in the above cause, by its Attorney General and its Solicitor General, and upon the bill of complaint herein and upon the attached affidavit of Elwood Mead, Commissioner of the Bureau of Reclamation, respectfully prays this Honorable Court to issue an order directing the defendant, The State of Arizona, to show cause, upon the earliest date convenient to the court, why an order should not issue restraining all interference by the defendant, the State of Arizona, its officers, agents, and employees, with the construction of Parker Dam pending the final determination of this action, as prayed in the bill of complaint.

HOMER S. CUMMINGS,
Attorney General.

J. CRAWFORD BIGGS,
Solicitor General.

January 1935.

108809—35

STATEMENT IN SUPPORT OF APPLICATION

The motion for leave to file the bill of complaint in this action was granted by the court on the 14th day of January 1935. Process was made returnable April 1, 1935.

The bill of complaint (Par. XIII) presented five prayers as follows:

> (a) That the defendant, the State of Arizona, be required to appear and answer this bill of complaint and therein to specifically set forth the nature and extent of its asserted right to interfere with the construction by the United States of said Parker Dam.
>
> (b) That any and every such asserted claim of right be adjudged and decreed to be null and void.
>
> (c) That all interference and threatened interference by the State of Arizona, its officers, agents, and employees, with the construction of Parker Dam be restrained pending the final determination of this action.
>
> (d) That the defendant, the State of Arizona, its officers, agents, and employees, be forever enjoined from interfering in any manner whatsoever with the construction, operation, and maintenance of Parker Dam and appurtenant works by the United States, its officers, agents, and employees.
>
> (e) That the plaintiff, the United States of America, have such other and further relief as it may be entitled to in equity and good conscience.

The United States will suffer irreparable injury unless the obstruction and interference by the defendant, the State of Arizona, complained of in the bill of complaint, is restrained pending the return of process and further proceedings in this cause. Unless the defendant, the State of Arizona, its officers and agents, are prevented from interfering with the construction and operation of said Parker Dam the constitutional power and authority of the United States in respect to the control of navigable rivers in aid of navigation, and the use thereof in the creation of public works for the material advantage and benefit of the public, will thereby be defeated and set at naught.

J. CRAWFORD BIGGS,
Solicitor General.

January 1935.

In the Supreme Court of the United States

OCTOBER TERM, 1934

No. 18, ORIGINAL

UNITED STATES OF AMERICA, PLAINTIFF

v.

THE STATE OF ARIZONA, DEFENDANT

AFFIDAVIT OF ELWOOD MEAD, COMMISSIONER OF THE BUREAU OF RECLAMATION, DEPARTMENT OF THE INTERIOR, IN SUPPORT OF THE APPLICATION

DISTRICT OF COLUMBIA, *ss.*

Elwood Mead, being first duly sworn, deposes and says that:

He is now and for several years last past has been the Commissioner of the Bureau of Reclamation. As such, he is the head of the Bureau of Reclamation, one of the bureaus of the Department of the Interior.

Affiant has read the bill of complaint in the above-entitled action and is cognizant of the facts alleged therein and states that the allegations contained in said bill of complaint are true to the best of his knowledge.

On August 23, 1934, the Bureau of Reclamation, with the approval of the Secretary of the Interior,

awarded to Six Companies, Inc., a contract for the construction of Parker Dam, the structure referred to in this affidavit and in the bill of complaint in this action. Said contract was let pursuant to specifications No. 574 of the Bureau of Reclamation, and was thereafter duly executed and is now in force.

On September 10, 1934, the contractor, Six Companies, Inc., was directed to proceed with the work, and construction was commenced. Parker Dam, as described in said specifications 574, is to be a concrete and steel structure located in the Colorado River about 13 miles above the Town of Parker, Arizona, and about 150 miles below the dam referred to in the bill of complaint as Boulder Dam. The construction of Parker Dam requires building of coffer dams, excavation of the river bed of the Colorado River to a depth of about 240 feet in order to establish the foundation on bed rock, and the excavation of diversion tunnels in Arizona at approximately the low-water level of the river. The river at that point is about 400 feet wide. The successful completion of this work requires complete control of the flow of the Colorado River. The period of construction of subwater works at Parker Dam, and the diversion tunnels, is accordingly determined by the period required for filling of Boulder Dam.

After construction work had been initiated at Parker Dam, and while said dam was actually under construction, the State of Arizona, acting

through its Governor, on November 7, 1934, and dates following, threatened, by the use of force, in the manner described in Paragraph XII of the bill of complaint, to stop and prevent further construction. Upon receipt by the Department of the Interior of advices that the Governor had dispatched armed forces to the dam site to carry out said threats, the Department ordered that work on the Arizona side of the river cease. To date this stoppage of work has meant a loss of about two and one-half months on the construction schedule of Parker Dam, during the most favorable construction months in that climate, and during the most advantageous water conditions in the river. It is imperative that work be resumed at once. Great loss and damage will result from further interruption in the progress of work on Parker Dam during this winter, because the Government is now ready to begin impounding water in Boulder Dam Reservoir and is in a position to completely control the release of water therefrom, and thus largely control the amount of water which has to be contended with in placing the deep foundations of Parker Dam. These favorable conditions will continue only for a limited time. The pouring of concrete in the main structure of Boulder Dam will be completed in February 1935, and power generation will be commenced in the fall of 1935, necessitating at that time the resumption of large discharges of water for the generation of power and satisfaction of irrigation and flood-control requirements as

specified in the Boulder Canyon Project Act. During the winter and spring months work on Parker Dam can proceed more rapidly and efficiently than during the summer season because of the climatic conditions at the site of the dam; the intense heat of summer seriously interferes with construction operations.

The contractor is now on the ground with large and costly equipment, ready to continue the construction of said dam.

Affiant is informed that the court has made process returnable in this case April 1, 1935. Unless a restraining order is issued, or other appropriate action taken to permit an immediate resumption of the work, in affiant's opinion the delay attendant upon awaiting final decision in this case prior to issuance of a permanent injunction will not only seriously enhance the cost of construction, but will greatly increase the hazard and risk of building the dam, because of the necessity of constructing it while the flow of the Colorado River is being impounded at Boulder Dam and before large quantities of water are released therefrom.

(Sgd.) ELWOOD MEAD.

Subscribed and sworn to before me this 16th day of January 1935.

(Sgd.) SOL ROTHBARD,
Notary Public, District of Columbia.

My commission expires Feb. 1, 1938.

U. S. GOVERNMENT PRINTING OFFICE: 1935

In the Supreme Court of the United States

OCTOBER TERM, 1934

No. 18, Original

THE UNITED STATES OF AMERICA, PLAINTIFF

v.

THE STATE OF ARIZONA, DEFENDANT

AFFIDAVIT OF HAROLD L. ICKES, SECRETARY OF THE INTERIOR, IN SUPPORT OF THE APPLICATION

DISTRICT OF COLUMBIA, *ss:*

HAROLD L. ICKES, Secretary of the Interior, being first duly sworn, deposes and says that:

He is the Secretary of the Interior and has held that office since the 4th day of March 1933. He is also the Federal Emergency Administrator of Public Works and has held that office since July 8, 1933. As part of a reclamation project undertaken pursuant to the authority of the reclamation law (act of June 17, 1902, 32 Stat. 388, as amended), and also as part of the comprehensive program of Federal Public Works, undertaken pursuant to Title II of the National Industrial Recovery Act (48 Stat. 195), he did, on August 25, 1934, execute on

behalf of the United States a contract with Six Companies, Inc., whereby it was agreed that the company would construct for the United States across the Colorado River at a point about 18 miles upstream from Parker, Arizona, a large monolithic concrete dam. The eastern abutment of said dam will rest upon public lands of the United States in the State of Arizona and its western abutment will rest upon unsurveyed public lands in the State of California. The aforesaid contract is now in force. On September 10, 1934, the contractor, Six Companies, Inc., was directed to proceed with performance of its contract, and construction work was commenced. In addition to the contract work the United States has engaged at the dam site a large number of employees who are supervising and assisting in the contract work and in other work at the dam site.

The State of Arizona has made great efforts to prevent the development of the Colorado River Basin which has been undertaken pursuant to the laws of the United States, including the Boulder Canyon Project Act (45 Stat. 1063); and in litigation before this Court failed in a suit to enjoin construction of Boulder Dam as an alleged interference with said State's alleged water rights. (*Arizona* v. *California*, 283 U. S. 423.) Subsequent to its failure in the aforesaid litigation before this Court, the State of Arizona has negotiated with affiant for a contract between the United States and the State of Arizona for the delivery of water from Boulder

Dam Reservoir. Negotiations for said contract are still under way.

On November 7, 1934, the Governor of the State of Arizona telegraphed to affiant to the effect that construction of Parker Dam without the consent of the State of Arizona would be a trespass upon the rights of that State, that the State of Arizona had not consented to the construction and would not so consent until its rights in the waters of the Colorado River had been settled to the satisfaction of said State. In said telegram the said Governor threatened to use all means and force at his command to stop and prevent construction in Arizona of Parker Dam, unless the consent of said State was first obtained. On November 10, 1934, said Governor proclaimed martial law in that part of the State of Arizona neighboring Parker Dam, and dispatched troops to carry out the threat conveyed by the aforesaid telegram. Affiant verily believes that the Governor of Arizona, in taking said action, was cognizant of the great and irreparable injury, hereinafter described, which the United States would suffer if construction work on Parker Dam was stopped. The said action of the State of Arizona had the effect of an attempt to coerce the affiant into executing a proposed water-delivery contract with Arizona. If executed, said proposed contract would, perhaps, have given to the State of Arizona some of the rights to waters of the Colorado River which said State had attempted but

failed to establish in the aforesaid litigation before this Court. Affiant could not and would not act precipitately upon the said proposed contract, particularly since the other States of the Colorado River Basin vigorously protested against execution of it and sought a hearing on their protests.

Under the State of Arizona's aforesaid threat of imminent armed interference with construction of Parker Dam, affiant suspended construction work in Arizona; and because of the continued threat of imminent, armed interference has been unable to resume said work.

A temporary restraining order or other appropriate action to relieve the United States from Arizona's interference with construction of Parker Dam, for which order or action application has been made to this Court in the above-entitled case, will not injure any known property right of the State of Arizona or of its residents or citizens.

The construction of Parker Dam will in no way affect whatever water rights the State of Arizona may have in the waters of the Colorado River. The right of the Metropolitan Water District of Southern California to divert water from the Colorado River is not dependent upon the construction of Parker Dam, but may be exercised in the absence of said construction and at places on the Colorado River other than at Parker Dam. Furthermore, construction of Parker Dam, instead of adversely affecting the interest of the State of Arizona in the waters of the Colorado River, will make phys-

ically possible the diversion of said waters for use on lands in Arizona.

The State of Arizona, its residents and citizens own no real or personal property along the Colorado River at the Parker Dam site nor in the vicinity of the proposed dam. All of the land on the Arizona bank and riparian to the Colorado River is owned and reserved by the United States and neither the State, nor any of its residents or citizens have any interest or property right therein. None of the property of the State or of its residents or citizens, therefore, will in any way be injured or adversely affected by the construction of Parker Dam. On the contrary, the construction of Parker Dam will make possible the generation of electricity for use in Arizona at a low cost and will make possible the reclamation of large areas of land in Arizona belonging to the United States, the State of Arizona and others.

The affiant further deposes, on information and belief, that the State of Arizona asserts some claim to the bed of the Colorado River where Parker Dam is being constructed, at which point the Colorado River is navigable. The only land of the State of Arizona or of its residents or citizens which could possibly be affected by the construction in Arizona of Parker Dam is the bed of the river to the thread of the stream which is the boundary between the States of California and Arizona.

If this Court grants in the above-entitled case a temporary restraining order or other appropriate

relief, as applied for by the United States, thereby permitting resumption of the construction of Parker Dam, the only construction work which can be done pending final decision in the above-entitled case is that required in the building of cofferdams, excavation of the river bed of the Colorado River to a depth of about 240 feet in order to establish the foundation of Parker Dam upon bedrock, and the excavation in Arizona (in land belonging to the United States) of diversion tunnels at approximately the low-water level of the river, all of which construction work can be abandoned without any damage to the river or the bed thereof.

In event the State of Arizona should finally prevail in the above-entitled case, construction work, pending final decision, cannot, therefore, result in more than mere nominal damages to the State of Arizona.

Distinguished from the mere nominal damages which the State of Arizona may possibly suffer, in event the said relief applied for is granted, the United States will certainly suffer, unless said relief is granted, great and irreparable injury. Unless said relief is granted, the subwater construction work on Parker Dam will be carried on at a great increase in cost, time required for construction, and risk to life and property.

Parker Dam, as described in Specifications No. 574 of the Bureau of Reclamation, pursuant to which the aforesaid contract was let and executed, is to be a concrete and steel structure located in

the Colorado River about 18 miles above the Town of Parker, Arizona, and about 150 miles below Boulder Dam. Construction of Parker Dam requires the subwater work of building cofferdams, excavation of the river bed of the Colorado River to a depth of about 240 feet in order to establish the foundation upon bedrock, and the excavation of diversion tunnels in Arizona at approximately the low-water level of the river. In order to complete successfully this work, above described, the flow of the Colorado River must be completely controlled; and this flow can be completely controlled only if it is small and constant.

The flow of the Colorado River at the Parker Dam site will be small and constant only during the period required for filling Boulder Dam reservoir. The Government is now ready to begin impounding water in Boulder Dam Reservoir and is now in a position to control completely the release of water therefrom. Power generation at Boulder Dam will be commenced in the fall of 1935, however, necessitating from that time on large discharges of water from the dam into the river for the generation of power and for the satisfaction of irrigatoin and flood-control requirements specified in the Boulder Canyon Project Act.

Unless the subwater work involved in construction of Parker Dam can be done during the period required for filling Boulder Dam Reservoir, the cost of constructing Parker Dam will be vastly in-

creased by reason of the expense involved in controlling the large flow of water which will be present in the river at Parker Dam after power generation is commenced at Boulder Dam.

Furthermore, foundation work carried on after the flow of water is increased in the fall of 1935 would involve risk to life and property far in excess of the risk involved in such work when carried on while the flow of water is low and constant. The construction plan of the dam requires an excavation across the bed of the river to a depth of about 240 feet. Men and machinery used in this excavation work are in a dangerous position; and the danger to said men and machinery greatly increases as the flow of the river increases.

In addition, work on Parker Dam can proceed more rapidly and efficiently during the winter and spring months than during the summer season because of climatic conditions at the site of the dam, since the intense heat of summer there seriously interferes with construction operations.

In order to minimize the cost and period of construction and the risk to life and property involved in construction, work was commenced in the fall of 1934. The requisite cofferdams and diversion tunnels must be completed before the aforesaid excavation for the foundation of the dam can be commenced. The interference of the State of Arizona, resulting in stoppage of the work, has, however, caused a loss of about 2½ months on the construction schedule of Parker Dam, during the most fa-

vorable construction months in the climate of the dam site, and during the most advantageous natural water conditions in the river. It is imperative that work be resumed at once, for if it is not it will be impossible to complete the foundation work before the fall of 1935 when large discharges of water from Boulder Dam Reservoir will increase the flow of the river at the Parker Dam site, thereby increasing the cost and time of construction and the risk to life and property involved in said construction.

In addition to the aforesaid irreparable injury, the United States, if construction of Parker Dam is further delayed, may become liable to Six Companies, Inc., for damages for failure to furnish to its contractor for Parker Dam an unimpeded right-of-way for construction purposes.

All of the carefully coordinated engineering plans for construction of Parker Dam are being disrupted by the passing of time, due to the armed interference of the State of Arizona directed against the United States and its officers, agents, employees, and contractors, for the said interference prevents the United States from proceeding with the work on Parker Dam in the orderly manner planned. Each day of delay in construction increases the great and irreparable injury which the United States is suffering.

The unusual and favorable conditions, created by the commencement at this time of the storage

of the river flow in Boulder Dam Reservoir and the complete control of the water in the river below said reservoir until development of power begins at Boulder Dam, can never be reproduced.

HAROLD L. ICKES.

Subscribed and sworn to before me this 17th day of January 1935.

[SEAL] FRANK JONES,

Notary Public, District of Columbia.

My commission expires January 10, 1936.

U. S. GOVERNMENT PRINTING OFFICE: 1935

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In the Supreme Court of the United States

OCTOBER TERM, 1934

No. 18, ORIGINAL

THE UNITED STATES OF AMERICA, PLAINTIFF

v.

THE STATE OF ARIZONA

BRIEF OF THE PLAINTIFF IN SUPPORT OF APPLICATION FOR A RESTRAINING ORDER, AND IN OPPOSITION TO THE DEFENDANT'S MOTION TO DISMISS THE BILL OF COMPLAINT

JURISDICTION

This is an original action by the United States against a State, brought under Article III, Section 2, clauses 1 and 2 of the Constitution of the United States.

QUESTIONS PRESENTED

Two motions are before the Court:

(a) The plaintiff has applied for an order restraining all interference by the defendant, the State of Arizona, its officers, agents, and employees, with the construction of Parker Dam pending the final determination of this action. The following questions are presented by this application:

(1) Does the complaint state a cause of action?

(2) Is there such a prospect of irreparable injury that a temporary restraining order should issue pending final determination of the action?

(b) The defendant has moved to dismiss the bill of complaint. The following questions are presented by this motion:

(1) Does the United States have constitutional authority to construct Parker Dam in the Colorado River for improvement of navigation, protection of federal property from floods, reregulation of water discharged from Boulder Dam, and reclamation of Indian and public lands, without the consent of the State of Arizona, within which State the eastern abutment of the dam will rest?

(2) If the consent of the State were necessary, do the provisions in the Arizona Enabling Act validly give such consent?

(3) Do the Secretary of the Interior and the Federal Emergency Administrator of Public Works possess adequate statutory authority to construct Parker Dam, and, in aid of such construction by the Government, to contract with the Metropolitan Water District of Southern California for cooperation by that District in financing the project?

CONSTITUTION, TREATIES, AND STATUTES INVOLVED

Constitution of the United States, Article III, Section 2, Clauses 1, 2; Article IV, Section 3, Clause

Constitution of Arizona, Article XX.

Treaty of Guadelupe Hidalgo, Feb. 2, 1848 (9 Stat. 922).

Act of March 3, 1865 (c. 127, 13 Stat. 541, 559).

Act of March 2, 1867 (c. 175, 14 Stat. 492, 514).

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Act of Dec. 5, 1924 (43 Stat. 701–2, 3).

Act of Dec. 21, 1928 (c. 42, 45 Stat. 1057).

The Colorado River Compact (November 24, 1922).

Act of June 16, 1933 (c. 90, 48 Stat. 195).

Executive Order No. 6252, dated August 16, 1933.

STATEMENT

This case brings before the Court for the third time a phase of the Colorado River controversy (*Arizona* v. *California*, 283 U. S. 423; *Arizona* v. *California*, 292 U. S. 341).

The bill of complaint was filed on January 14, 1935. Process issued on that date, returnable April 1, 1935. On January 18, 1935, the United States applied to the Court for an order to show cause why

a temporary restraining order should not issue. The order issued on January 21, 1935, returnable February 4, 1935. On February 2, 1935, the defendant filed a return to the order to show cause and a motion to dismiss the bill of complaint.

The bill of complaint, in brief, alleges that on November 7, 1934, the United States was engaged in the construction of Parker Dam, in the Colorado River on the Arizona-California boundary, for the purposes of improvement of navigation, flood control, re-regulation of water discharge from Boulder Dam, and reclamation of lands within the Colorado River Indian Reservation and public lands, pursuant to the Reclamation Act (c. 1093, 32 Stat. 388), and acts amendatory thereto, and the National Industrial Recovery Act (c. 90, 48 Stat. 195); that thereupon the defendant State of Arizona, by the proclamation of martial law and the threat of armed force, stopped construction and has continued to prevent work on the dam. It is alleged that the dam must be constructed during the limited time while the flow of the Colorado River is being impounded during the filling of Boulder Dam reservoir.

The bill prays the issuance of a permanent injunction, and other remedies.

The application for a restraining order alleges that the United States will suffer irreparable injury if construction of Parker Dam is delayed. The application is supported by affidavits of the

Commissioner of Reclamation and the Secretary of the Interior, stating the necessity for immediate resumption of construction, and the irreparable character of the injury which will be sustained if the conditions now temporarily existing by virtue of the filling of Boulder Dam reservoir, and which can never be restored, are not availed of for construction of Parker Dam.

Arizona's return to the order to show cause is accompanied by a motion to dismiss the bill of complaint, and, in support both of the return to the rule and of the motion to dismiss, by an affidavit of Governor B. B. Moeur of that State and by a brief.

There are, consequently, two matters now before the Court: The plaintiff's application for a restraining order, and the defendant's motion to dismiss the bill of complaint. The issues upon the motion to dismiss the bill of complaint are, of course, restricted to the face of the bill; the motion necessarily admits all properly pleaded allegations. The affidavit of the Governor contradicting the allegations of the bill of complaint and alleging affirmative matter, such as the contents of telegrams which he has received from a United States Senator concerning this case, is therefore not properly before the Court on any issue raised by the motion to dismiss, although the defendant's brief in support of that motion relies on the statements in the Governor's affidavit. These statements, if they constitute defenses to this action,

may be raised hereafter by way of answer in a proper pleading. The Court may pass upon the application for a restraining order and the motion to dismiss separately, and at different times. Accordingly, this brief is divided into two parts: Part I deals with the motion to dismiss, and Part II with the application for a restraining order.

SUMMARY OF ARGUMENT

Part I. The defendant's Motion to Dismiss the Bill of Complaint should be denied.

(1) The United States has constitutional power to construct Parker Dam in aid of navigation and flood control. The bill alleges, and its allegations must be taken as admitted by the motion to dismiss, that Parker Dam will reregulate and equate, in aid of navigation and flood control, the waters discharged at Boulder Dam, and will impound and control the floods of the Bill Williams River and other waters entering the Colorado River between Parker Dam and Boulder Dam which now imperil navigation and cause damage to the Colorado River Indian Reservation and other federal property. The consent of the State of Arizona is not necessary to the exercise of these Federal powers.

(2) The United States has constitutional power to construct Parker Dam for the reclamation of Indian and public lands. The bill of complaint alleges, and the allegations must be deemed admitted by the motion to dismiss, that the Colorado

River Indian Reservation contains about 150,000 acres of irrigable land, which, however, require pumping or diversion of waters of the Colorado River for the reclamation thereof, and that Parker Dam is so designed and will be so constructed as to enable the reclamation of all lands within the reservation by means of pumping with electric energy to be generated at Parker Dam, or by means of diversion of water at the dam, or both. The consent of the State of Arizona is not necessary for the exercise of the federal power to reclaim and irrigate lands within an Indian Reservation and public lands, and to erect structures necessary for the furnishing of water for such purposes.

(3) If the consent of the State of Arizona were otherwise necessary, the provisions of the Enabling Act under which the State was admitted to the Union specifically consent to the erection of works for reclamation purposes. The stipulation in the Enabling Act is a valid provision for the protection of interests of the United States in Indian and public lands.

(4) The Secretary of the Interior and the Public Works Administrator have adequate statutory authority for the construction of Parker Dam. The Secretary is authorized by the Act of April 21, 1904 (c. 1402, 33 Stat. 189, 224), to divert waters of the Colorado River and to reclaim lands within the Colorado River Indian Reservation therewith. He is authorized by the act of March 4, 1921 (c. 161,

41 Stat. 1367, 1404), to accept funds furnished by other parties and to expend them under the Reclamation Act as though specifically appropriated by Congress. The contract of February 10, 1933, between the United States and the Metropolitan Water District of Southern California is an advantageous and proper exercise of that authorization. The United States will build, own, and control Parker Dam, and the fact that the District will receive benefits by its construction and will pay for those benefits, does not diminish the Federal interest.

Independently, the Federal Emergency Administrator of Public Works is authorized by the National Industrial Recovery Act (c. 90, 48 Stat. 195, Title II) to construct or aid in the construction or financing of conservation and river improvement works, and to utilize other governmental officers and agencies in so doing, including necessarily the Secretary of the Interior. It is immaterial that the National Industrial Recovery Act was enacted after the execution of the contract of February 10, 1933, between the United States and the Metropolitan Water District; the Recovery Act was in force when the construction of Parker Dam was commenced, and the project had been duly included in the "comprehensive program of public works" prior thereto. The existence or nonexistence of the contract of February 10, 1933, did not affect the validity of the authority exercised under the Re-

covery Act, as distinguished from the independent bases of authority existing prior to passage of that act.

As to the action of the Chief of Engineers: First, the "recommendation" of a project under the Industrial Recovery Act (c. 90, 48 Stat. 195, Title II), unlike the "approval" of a project under the Act of March 3, 1899 (30 Stat. 1151), and its supplements, is recognized by Congress as an authorization independently of concurrence by the State. Second, the 1899 Statute relates solely to construction by private parties, not to projects constructed by the United States.

Part II. The plaintiff's application for a temporary restraining order should be granted:

(1) The bill states a cause of action entitling the United States to a permanent injunction. The argument upon this point has been presented in relation to the motion to dismiss the bill of complaint.

(2) The United States will suffer irreparable injury if the State of Arizona is permitted to continue its forcible prevention of construction pending final determination of this suit. First, the continued use, or threat of use, of troops to prevent action by the Federal Government in lieu of recourse by Arizona to this Court, should not be sanctioned, and whatever the final decision in this case may be, this method of obstruction should be restrained pending the orderly consideration by

this Court of the motion to dismiss and of the further proceedings that may be had in the case. Second, the statements in the Government's affidavits that successful completion of Parker Dam requires immediate resumption of construction, in order to take advantage of the temporary impounding of the flow of the river at Boulder Dam, are not denied by the defendant's response to the order to show cause or by its affidavit. The defendant specifically admits that "enormous advantages" accrue to the United States through construction of Parker Dam, and these advantages will be lost, without benefit to the defendant, if work is further prevented.

ARGUMENT

PART I. ON THE MOTION TO DISMISS

I

THE UNITED STATES HAS CONSTITUTIONAL POWER TO CONSTRUCT PARKER DAM IN AID OF NAVIGATION AND FLOOD CONTROL

In *Arizona* v. *California*, 283 U. S. 423, 457, this Court said, referring to Boulder Dam:

> Since the grant of authority to build the dam and reservoir is valid as an exercise of the constitutional power to improve navigation, we have no occasion to decide whether the authority to construct the dam and reservoir might not also have been constitutionally conferred for the specified purpose of irrigating public lands of the United States.

> Compare *United States* v. *Rio Grande Dam & Irrig. Co.*, 174 U. S. 690, 703; *United States* v. *Alford*, 274 U. S. 264. Or for the specified purpose of regulating the flow and preventing floods in this interstate river. Or as a means of conserving and apportioning its waters among the states equitably entitled thereto. Or for the purpose of performing international obligations. Compare *Missouri* v. *Holland*, 252 U. S. 416.

The present controversy presents certain of those issues mentioned but not decided in that case, as well as the issue of improvement of navigation common to both cases.

Navigation.—The bill of complaint (p. 5) alleges, and the motion to dismiss necessarily admits, that:

> Parker Dam and Reservoir are so located and designed both as to reservoir capacity and outlet works as to be operated by synchronization with Boulder Dam so that Parker Dam will:
>
> 1. Re-regulate and equate, in aid of navigation and river regulation, the waters discharged at Boulder Dam in response to requirements of flood control and fluctuating power and irrigation demands;
>
> 2. Permit the discharge of water for generation of power at Boulder Dam which otherwise would be required to be retained in storage for river regulation, improvement of navigation, flood control, irrigation, and domestic uses;

3. Permit the conservation for irrigation and domestic uses and satisfaction of present perfected rights of waters required to be discharged at Boulder Dam for improvement of navigation, river and flood control, and power generation.

These allegations being conceded, it is immaterial whether Arizona owns the bed of the river, as the defendant's brief contends (p. 11). Such title as the State may have is a "qualified title", subject to the "servitude in respect to navigation" created in the Federal Government by the Constitution. *Arizona* v. *California,* 283 U. S. 423; *New Jersey* v. *Sargent,* 269 U. S. 328, 337, 340; *United States* v. *Chandler-Dunbar Co.,* 229 U. S. 63, 72; *Scranton* v. *Wheeler,* 179 U. S. 141, 163; *Gibson* v. *United States,* 166 U. S. 269, 272. The Federal authority is not impaired by "the fact that purposes other than naviation will also be served." *Arizona* v. *California,* 283 U. S. 423, 456. The regulation of a river so as to obtain a more nearly constant flow is certainly a means "not unrelated to the control of navigation"; *United States* v. *Chandler-Dunbar Co., supra.* Boulder Dam, located 150 miles above Parker Dam, is a structure erected for improvement of navigation and other purposes, those other purposes including the generation of power and the storage and release of water for irrigation and flood-control requirements. *Arizona* v. *California, supra.* Manifestly the reregulation of water discharged at Boulder Dam in response to flood con-

trol, irrigation, and power requirements, and thus discharged in fluctuating quantities, is in aid of navigation. The bill alleges that Parker Dam will provide a reservoir capacity of 717,000 acre-feet.

Arizona argued in *Arizona* v. *California*, 283 U. S. 423, that Boulder Dam was an obstacle, rather than an aid, to navigation. That argument is repeated here. Since the bill alleges, and the motion to dismiss admits, that the dam will aid navigation by reregulating the flow of the river below it, it seems unnecessary that the bill should allege that locks or other means of passage will be installed at Parker Dam for the further assistance of navigation when traffic warrants the expenditure. The contract between the United States and the Metropolitan Water District, pursuant to which the dam is being constructed, specifically makes provision for financing the costs of " such facilities for navigation as the Secretary may find necessary " (Article 10). This contract appears in the Appendix. No provision for locks has been made at Boulder Dam, and the Boulder Canyon Project Act (c. 42, 45 Stat. 1057) does not provide for locks at Laguna Dam or any other dam referred to in that statute.

Flood Control.—The bill alleges that Parker Dam will protect Indian and public lands from damage by the floods of the Colorado River and the Bill Williams River. The flow of the latter river, which enters the Colorado immediately above the dam site, has varied between 9 cubic feet per

second and 50,000 cubic feet per second within a period as short as two weeks. These floods are of short duration, but of heavy volume, constituting a constant menace to the Colorado River Indian Reservation and public lands of the United States in Arizona and California, as well as to the navigation of the Colorado River below the site of Parker Dam. For data on the destructive character of a 50,000-second-foot flood at these points, see United States Geological Survey Water Supply Paper 734, p. 88, and Senate Document 142, 67th Cong., 2d Session, p. 56. The United States has heretofore expended $2,462,000 for flood control of the Colorado River below the site of Parker Dam, and the Act of Congress of January 21, 1927 (c. 47, 44 Stat. 1010, 1021), authorized annual appropriations of $100,000 for defraying the cost of Colorado River front work. The Appropriation Acts are cited in the Appendix.

This Court has not directly passed upon the power of the Federal Government to construct works for flood control, independent of navigation improvements. See, however, references to the question in *Arizona* v. *California*, 283 U. S. 423, 458, particularly footnote No. 9. Where the land to be protected by flood control is the property of the United States, the Federal Government undoubtedly has power to regulate the flow of the stream. We suggest that the qualified interest of the State in the bed of a navigable stream is subject

to a servitude in respect to Federal flood-control, comparable to the "servitude in respect to navigation", to which flood control is related. Compare *Gilman* v. *Philadelphia*, 3 Wall. 713, 725; *Philadelphia Co.* v. *Stimson*, 223 U. S. 605; *Gibson* v. *United States*, 166 U. S. 269; *New Jersey* v. *Sargent*, *supra*; *Cubbins* v. *Mississippi River Commission*, 241 U. S. 351. The power of the United States to deal with the bed of a navigable stream without the consent of the State is not limited to purposes of navigation and commerce, provided that the purpose be Federal. Such a restriction was urged and specifically denied in *United States* v. *Winans*, 198 U. S. 371, 382. And, if protection of Federal property is the purpose of the work, it is not fatal to the exercise of the power that the act of protection must be done on lands in which the State or private parties have an interest. *United States* v. *Alford*, 274 U. S. 264; *Camfield* v. *United States*, 167 U. S. 518.

Consent of the State to Navigation and Flood Control Improvements.—If the United States has the constitutional power to erect Parker Dam for the purposes alleged in the bill of complaint, the exercise of that power is not subject to control by the State, *Arizona* v. *California*, 283 U. S. 423, 451. The cases cited by Arizona (Defendant's brief, p. 13 *et seq.*), in support of the contention that the concurrent consent of Congress and of the State is required for erection of structures in a navigable

stream are all cases involving construction by private parties, not by the United States. The defendant's references to the Act of March 3, 1899 (30 Stat. 1151) and its amendments are likewise not in point; this statute relates to construction by private parties.

II

THE UNITED STATES HAS CONSTITUTIONAL POWER TO CONSTRUCT PARKER DAM FOR THE RECLAMATION OF THE COLORADO RIVER INDIAN RESERVATION AND PUBLIC LANDS

The bill of complaint alleges (par. 14) that, beginning in 1865, Congress has carried forward an irrigation program for the Reservation at a cost to date of $1,359,000 for the ultimate reclamation of 150,000 acres within the Colorado River Indian Reservation; that this area is irrigable, but that pumping of waters of the Colorado River, or diversion of waters of the River by a dam and canal, is necessary for such reclamation. It alleges that the construction of Parker Dam will enable the reclamation of all lands in the Reservation at a cost less than is feasible by any other method; that Parker Dam will furnish hydroelectric energy for pumping, as well as provide diversion works. It also alleges that several hundred thousand acres of public lands lie along and near the Colorado River below Parker Dam, and that those lands are irrigable in like manner.

The Government may, for an appropriate public purpose, establish an interest in a navigable stream bed prior to the admission of a State, and that interest will survive the admission of the new State. *Shively* v. *Bowlby*, 152 U. S. 1, 47:

> Notwithstanding the *dicta* contained in some of the opinions of this court, already quoted, to the effect that Congress has no power to grant any land below high-water mark of navigable waters in a Territory of the United States, it is evident that this is not strictly true. * * *
>
> By the Constitution, as is now well settled, the United States, having rightfully acquired the Territories, and being the only government which can impose laws upon them, have the entire dominion and sovereignty, national and municipal, Federal and state, over all the Territories, so long as they remain in a territorial condition. * * *
>
> We cannot doubt, therefore, that Congress has the power to make grants of lands below high-water mark of navigable waters in any Territory of the United States, whenever it becomes necessary to do so in order to perform international obligations, or to effect the improvement of such lands for the promotion and convenience of commerce with foreign nations and among the several States, or to carry out other public purposes appropriate to the objects for which the United States hold the Territory.

The protection of the interests of an Indian Tribes constitutes an appropriate public purpose. *McGilvra* v. *Ross*, 215 U. S. 70.

Thus the United States may, by the creation of an Indian reservation prior to statehood and by legislation for the protection of the water rights of that reservation, create an interest in the Indians' favor which will not be impaired by later inclusion of these lands within the boundaries of a new State. In *Winters* v. *United States*, 207 U. S. 564, the United States sued successfully to restrain the erection of reservoirs which would have impounded waters of the Milk River flowing down to the Fort Belknap Indian Reservation. The land on which the dams would have been built had originally been in the possession of the Indians, but had been ceded to the United States. After the cession, and before ratification of a second treaty, the new State of Montana, within whose borders all of the land lay, was admitted to the Union. The defendants' reservoirs had been licensed by the State. The Court held (p. 577):

> Another contention of appellants is that if it be conceded that there was a reservation of the waters of Milk River by the agreement of 1888, yet the reservation was repealed by the admission of Montana into the Union, February 22, 1889, c. 180, 25 Stat. 676, "upon an equal footing with the original States." The language of counsel is that "any reservation in the agreement with

> the Indians, expressed or implied, whereby the waters of Milk River were not to be subject of appropriation by the citizens and inhabitants of said State, was repealed by the act of admission." But to establish the repeal counsel rely substantially upon the same argument that they advance against the intention of the agreement to reserve the waters. The power of the Government to reserve the waters and exempt them from appropriation under the state laws is not denied, and could not be. *The United States* v. *The Rio Grande Ditch & Irrigation Co.*, 174 U. S. 690, 702; *United States* v. *Winans*, 198 U. S. 371. That the Government did reserve them we have decided, and for a use which would be necessarily continued through years. * * *

For cases in the lower courts following the *Winters case*, see *Conrad Inv. Co.* v. *United States*, 161 Fed. 829; *United States* v. *Morrison*, 203 Fed. 364, 365.

The *Winters* case involved a nonnavigable stream. But the Government's power to continue the development and protection of Indian rights in a stream which were established prior to statehood is not curtailed by the admission of a State, even though the use of the bed of a navigable stream is involved. In *United States* v. *Winans*, 198 U. S. 371, the Court, citing *Shively* v. *Bowlby*, *supra*, upheld the right of the Yakima Indians to take fish from the Columbia River at "all usual and

accustomed places." The right was claimed under the provisions of a treaty between the United States and the Indians, made in 1859, prior to the admission of the State of Washington. The right was contested by certain owners of riparian lands under patents from the United States, who held fishing wheel licenses from the State of Washington. The Court, at pages 382–384, stated:

> It is further contended that the rights conferred upon the Indians are subordinate to the powers acquired by the State upon its admission into the Union. In other words, it is contended that the State acquired, by its admission into the Union "upon an equal footing with the original States", the power to grant rights in or to dispose of the shore lands upon navigable streams, and such power is subject only to the paramount authority of Congress with regard to public navigation and commerce. The United States, therefore, it is contended, could neither grant nor retain rights in the shore or to the lands under water.
>
> The elements of this contention and the answer to it are expressed in *Shively* v. *Bowlby*, 152 U. S. 1. It is unnecessary, and it would be difficult, to add anything to the reasoning of that case. The power and rights of the States in and over shore lands were carefully defined, but the power of the United States, while it held the country as a Territory, to create rights which would be binding on the States was also announced, opposing the dicta scattered through the

> cases, which seemed to assert a contrary view. * * *
>
> The extinguishment of the Indian title, opening the land for settlement and preparing the way for future States, were appropriate to the objects for which the United States held the Territory. And surely it was within the competency of the Nation to secure to the Indians such a remnant of the great rights they possessed as "taking fish at all usual and accustomed places." Nor does it restrain the State unreasonably, if at all, in the regulation of the right. *It only fixes in the land such easements as enables the right to be exercised.* (Italics supplied.)

The project for irrigating the Colorado River Indian Reservation had been definitely initiated prior to the statehood of Arizona, beginning in 1865, and continued by the appropriation of many thousands of dollars, as shown by the appropriation acts cited in the Appendix. The diversion of water (and inferentially, the construction of diversion works) was specifically authorized by the Act of April 21, 1904 (c. 1402, 33 Stat. 189, 224), which authorized the Secretary of the Interior to divert the waters of the Colorado River and to reclaim, utilize, and dispose of any land in the Colorado River Indian Reservation which might be made irrigable by works constructed under the Reclamation Act.

As to the Reservation, therefore, the preexisting power to construct reclamation works would

clearly have not been curtailed by admission of Arizona to the Union, whether or not the State consented to the continuance of those powers. But the State did affirmatively consent, in a form which, to quote *United States* v. *Winans,* 198 U. S. 371, 384, "fixes in the land such easements as enables the rights to be exercised." That agreement is discussed under heading III.

As to public lands. The federal authority to construct reclamation works for public lands is to be distinguished from the power to regulate the use of water. *Arizona* v. *California,* 243 U. S. 389. The United States is certainly free of the police regulations of a State in exercising the first function (*United States* v. *Rio Grande Dam & Irrigation Co.,* 174 U. S. 690, 703), which is all that is involved in the controversy in its present stage.

III

IF THE CONSENT OF ARIZONA WERE OTHERWISE NECESSARY FOR THE CONSTRUCTION OF PARKR DAM IN AID OF RECLAMATION OF INDIAN AND PUBLIC LANDS, THAT CONSENT HAS BEEN IRREVOCABLY GIVEN

The Enabling Act, under which Arizona was admitted to the Union (Act of June 20, 1910, c. 310, 36 Stat. 557, 570) contains the following stipulation:

> Seventh. That there be and are reserved to the United States, with full acquiescence of the State, all rights and powers for the

> carrying out of the provisions by the United States of the Act of Congress entitled "An Act appropriating the receipts from the sale and disposal of public lands in certain States and Territories to the construction or irrigation works for the reclamation of arid lands", approved June seventeenth, nineteen hundred and two, and Acts amendatory thereof or supplementary thereto, to the same extent as if said State had remained a territory.

The stipulation was included in the constitution of Arizona (Article XX), and remained there until repealed on June 7, 1927. The attempted repeal was ineffective if the original stipulation was valid, inasmuch as it constituted a part of a compact which in terms was irrevocable, and the United States has not consented to its amendment.

Arizona contends (defendant's brief, p. 22) that the United States can assert no rights under the Enabling Act reservation, which she says is in derogation of her sovereignty and therefore void. To the contrary, it appears that the stipulation was for the protection of the right of use and development of Federal property. If so, on the authority of the cases cited below, it was a valid provision. Arizona's brief itself assumes (p. 21) that in reclaiming public or Indian lands the United States "acts in the capacity of a proprietor of its own lands and as a guardian or trustee of Indian lands."

The Federal Constitution, Article IV, Section 3, Clause 1, provides:

> New States may be admitted by the Congress into this Union; but no new State shall be formed or erected within the Jurisdiction of any other State; nor any State be formed by the Junction of two or more States, or Parts of States, without the Consent of the Legislatures of the States concerned as well as of the Congress.

As originally reported to the Constitutional Convention, this section contained the following additional language:

> If the admission be consented to, the new State shall be admitted on the same terms as the original ones. But the Legislature may make conditions with the new States concerning the public debt which shall be then subsisting.

The additional clause was stricken out, "upon the view that a wide latitude ought to be given to the Congress, and the denial of any attempt to impede the growth of the western country." *Boyd* v. *Thayer,* 143 U. S. 135, 163.

The leading cases on this clause are *Coyle* v. *Oklahoma,* 221 U. S. 559, and *Stearns* v. *Minnesota,* 179 U. S. 223. The former case held unconstitutional a stipulation in the Oklahoma Enabling Act prohibiting the removal of the State capital from the City of Guthrie for a specified period of years.

Coyle v. *Oklahoma, supra,* classified enabling act stipulations in three groups: It distinguished (p. 568)—

> first, between provisions which are fulfilled by the admission of the State; second, between compacts or affirmative legislation intended to operate *in futuro,* which are within the scope of the conceded powers of Congress over the subject; and third, compacts or affirmative legislation which operates to restrict the powers of such new States in respect of matters which would otherwise be exclusively within the sphere of state power.

Stearns v. *Minnesota, supra,* drew this distinction between void and valid enabling act stipulations (p. 244):

> * * * In an inquiry as to the validity of such a compact this distinction must at the outset be noticed. There may be agreements or compacts attempted to be entered into between two States, or between a State and the nation, in reference to political rights and obligations, and there may be those solely in reference to property belonging to one or the other. That different considerations may underlie the question as to the validity of these two kinds of compacts or agreements is obvious. It has often been said that a State admitted into the Union enters therein in full equality with all the others, and such equality may forbid any agreement or compact limiting or qualifying

> political rights and obligations; whereas, on the other hand, a mere agreement in reference to property involves no question of equality of status, but only of the power of a State to deal with the nation or with any other State in reference to such property. * * *

We believe that the compact contained in the Arizona Enabling Act was an "agreement in reference to property." The property involved was a large area of Indian and public land, worthless unless the Government's right to irrigate this area was preserved. *United States* v. *Winans, supra,* established that an Indian right to the use of the bed of a navigable river, initiated before statehood, constituted a right which the advent of statehood could not impair. The 1904 Statute, authorizing a diversion of water (c. 1402, 33 Stat. 189, 224), if not the appropriation statutes between 1865 and 1910 cited in the Appendix, had specifically initiated an Indian water right which the enabling act stipulations were competent to protect. *Winters* v. *United States,* 207 U. S. 564, has shown that such an Indian right, initiated even without specific legislative protection, survives statehood.

In our view, the Arizona Enabling Act was an "affirmative declaration" by the United States of rights in the stream and stream bed previously initiated on behalf of Federal reclamation projects and of its Indian wards. Compare *United States* v. *Holt State Bank,* 270 U. S. 49, and *Brewer El-*

liott Oil and Gas Co. v. *United States*, 260 U. S. 77. It was an "expression of the intention of Congress to continue the burdens in question in the State." Compare *Ward* v. *Race Horse*, 163 U. S. 504. It "fixes in the land such easements as enables the right to be exercised." *United States* v. *Winans*, 198 U. S. 371, 382.

The enabling act compact would have been valid whether the lands intended to be protected were riparian or not. But the bill alleges that the United States is owner of large riparian areas below Parker Dam, and at the dam site and the reservoir site, and the enabling act clauses may derive additional support from that fact.

A State may validly recognize an interest in the bed of a navigable stream in favor of a riparian landowner. *Shively* v. *Bowlby*, 152 U. S. 1. "Thus, if the State chooses to resign to the riparian proprietor sovereign rights over navigable rivers which it acquired on assuming statehood, it is not for others to raise objections." *Fox River Paper Co.* v. *Railroad Comm.*, 274 U. S. 651, 655. See also *Barney* v. *Keokuk*, 94 U. S. 324; *Mobile Transportation Co.* v. *Mobile*, 187 U. S. 479.

Or a State may validly agree to recognize the interest of another State, either proprietary or sovereign, or both; *Central R. R. Co.* v. *Jersey City*, 209 U. S. 473 (70 N. J. 81). Compare *People* v. *Central R. R. of New Jersey*, 42 N. Y. 283; *Ferguson* v. *Ross*, 126 N. Y. 459; *Massachusetts* v. *New*

York, 271 U. S. 65; *Alsos* v. *Kendall*, 111 Ore. 359; *State* v. *Cunningham*, 59 So. 76, 79.

And a State may validly yield such an interest to the United States itself. In *Donnelly* v. *United States*, 228 U. S. 243, the defendant had been indicted by the United States for murder committed upon the stream bed adjoining a riparian Indian reservation. While the Court held that the river was not navigable and that the Federal title to the reservation embraced the bed of the stream, it further held that if the stream were navigable (as the local law of California had held it to be), that the law of California conferred upon the riparian owner the title to the stream bed to the thread of the river, and that such title would have been an adequate basis for Federal jurisdiction. The Court said (p. 262):

> Thus the State of California, if she sees fit, may confer upon the riparian owners the title to the bed of any navigable stream within her borders.

And see the *dicta* in *Brewer Elliott Oil and Gas Co.* v. *United States, supra*, as to the recognition by a State of Indian riparian rights to a streambed.

In *United States* v. *Rio Grande Irrigation Co., supra*, p. 703, this Court said:

> * * * in the absence of specific authority from Congress a State cannot by its legislation destroy the right of the United States, as the owner of lands bordering on a

> stream, to the continued flow of its water; so far at least as may be necessary for the beneficial uses of the government property.

An agreement specifically preserving such a right appears valid.

IV

THE SECRETARY OF THE INTERIOR HAS ADEQUATE STATUTORY AUTHORITY FOR THE CONSTRUCTION OF PARKER DAM, AND THE CONTRACT OF FEBRUARY 10, 1933, WITH THE METROPOLITAN WATER DISTRICT IS A VALID EXERCISE OF THAT AUTHORITY

The defendant's brief contends that both the Secretary of the Interior and the Federal Emergency Administrator of Public Works lack statutory authority to construct Parker Dam.

The Authority of the Secretary of the Interior to Construct the Dam

Section 25 of the Act of April 21, 1904 (c. 1402, 33 Stat. 189, 224), which has been cited on a previous page, provides in substance:

> * * * that in carrying out any irrigation enterprise which may be undertaken under the provisions of the reclamation act * * * and which may make possible and provide for, in connection with the reclamation of other lands, the reclamation of all or any portion of the irrigable lands on the Yuma and Colorado River Indian reservations in California and Arizona, the Secretary of the Interior is hereby authorized to divert the waters of the Colorado River and to reclaim, utilize and dispose of any lands

> in said reservations which may be irrigable by such works in like manner as though the same were a part of the public domain. * * *.

Proceeding under this authority the Secretary, in 1905, constructed Laguna Dam (near Yuma) for the benefit, in part, of the Yuma Reservation (which includes lands at the eastern end of Laguna Dam) but at the cost of the Yuma Project.

The statutory authority for the erection of works in a navigable river by an officer of the United States need not be specific, and is not invalid because it leaves to his discretion how and where the works shall be built. Cf. *South Carolina* v. *Georgia*, 93 U. S. 4, 13. In the Boulder Canyon project Act the *site* of the dam authorized to be built was not fixed by the Act, but the determination of that question was left to the discretion of the Secretary of the Interior. The Act provided that the dam should be built at Black Canyon or at Boulder Canyon. The Secretary decided upon the site at Black Canyon and it is there that the Boulder Dam is built.

If the use of Parker Dam site, and the generation of power there for pumping water to the Colorado River Indian Reservation is, in the Secretary's opinion, the most feasible way to carry out the "diversion of water" authorized by the 1904 statute, it is immaterial that the site itself is not within the limits of the reservation. Cf. *United States* v. *Alford, supra.* In the *Winans Case,*

supra, as here, the disputed location was outside the limits of the reservation.

The Secretary's authority to finance construction by means of the contract of February 10, 1933, with the Metropolitan Water District

The bill recites that on February 10, 1933 the Secretary entered into a contract with the Metropolitan Water District of Southern California whereby the District agreed to prepay the cost of Parker Dam in return for certain benefits, including use of one-half of the power privilege; the United States, nevertheless, to own and control the structure and, without contribution by the Government to the cost of the dam, to utilize the reservoir capacity for river regulation and improvement of navigation, flood control and irrigation, diversion of water, reclamation of Colorado River Indian Reservation and public lands, and to utilize one-half of the power privilege for reclamation of those areas.

Arizona's brief contends (p. 26 *et seq.*) that the Secretary was without authority to make that contract, and that in carrying it out the Interior Department is building Parker Dam for the Metropolitan Water District.

The Act of March 4, 1921 (41 Stat. 1404) provides:

> All moneys hereafter received from any state, municipality, corporation, association, firm, district, or individual for investigations, surveys, construction work, or any

> other development incident thereto involving operations similar to those provided for by the reclamation law shall be covered into the reclamation fund and shall be available for expenditure for the purposes for which contributed in like manner as if said sums had been specifically appropriated for said purposes.

Section 2 of the Act of February 21, 1911 (36 Stat. 926) authorizes the Secretary, upon such terms as may be agreed upon, to cooperate with irrigation districts, water users' associations, corporations, entrymen, or water users for the construction or use of such reservoirs, canals, or ditches as may be advantageously used by the Government and irrigation districts, etc., for impounding, delivering, and carrying water for irrigation purposes.

The brief of the defendant admits that "enormous advantages accrue to the United States" under its contract with the Metropolitan Water District (pp. 26, 27), including a power privilege which the brief estimates to be worth from $12,000,000 to $17,000,000 (p. 28). It argues that the District would not have yielded such a valuable right unless it anticipated "very valuable considerations which are not expressed in the contract." If this argument is relevant, it demonstrates two things: First, that the Secretary made a provident contract, whereby, without cost to the taxpayers of the United States, the objective of the Act of April

21, 1904 (c. 1402, 33 Stat. 189, 224) to provide water for the Indians, as well as the objectives of navigation improvement and flood control, could be accomplished; second, that since the District obtained, in addition to other benefits, a power privilege exactly equal to the Government's, and thus worth, on Arizona's statement, from $12,000,000 to $17,000,000, the District received full value for its $13,000,000 payment. Such an arrangement appears well within the authority of the Act of March 4, 1921 (c. 161, 41 Stat. 1367, 1404) and February 21, 1911 (36 Stat. 926). That authority has been frequently exercised in the construction of other projects, as shown by the annual reports of the Secretary of the Interior cited in the Appendix. The Court may take judicial notice of those reports. *Arizona* v. *California,* 283 U. S. 423, 457, Note 8; *Tempel* v. *United States,* 248 U. S. 121.

It is immaterial whether the District could or could not have built the dam without Arizona's consent.

The Federal title, control, and use of Parker Dam are not lessened by the fact that the District is advancing its cost in payment for a limited right to its benefits. The dam is designed by the Bureau of Reclamation engineers, the specifications are written by them, bids are taken by the Government, the construction contract is made by the United States, and the contractor and materialmen are paid by Treasury vouchers. The difference be-

tween this project and those like it—such as American Falls and Jackson Lake, on the one hand, and projects such as the All American Canal, on the other—is in one respect only: in the first, the Government is placed in funds in advance, and in the second, it must recoup its expenditures after construction. In both cases the Government is made whole by a funding contract with an entity which will benefit by the expenditure. Generally the whole benefit goes to that entity—that is, all of the water impounded, and all of the proceeds of power. See the "Fact Finders' Act" (Act of Dec. 5, 1924, 43 Stat. 701, 703), subsection "J", providing for credit of "total accumulated net profits" to the repayment contract on transfer of operation and maintenance to the water users. Here the Government retains half the power privilege, and runs no risk on its investment. The authority of the United States to exercise eminent domain in aid of a "contributed funds" project (American Falls, Idaho) was sustained in *Brown* v. *United States,* 263 U. S. 78.

The claim of Arizona that, notwithstanding the indicia of Federal interest in the Parker Dam Project, the United States is in fact acting on behalf of the Metropolitan Water District, and as its agent, is similar to the objection which has been raised and answered in a number of eminent domain cases, in which the power of eminent domain was resisted on the ground that while nominally it

was exercised in behalf of a qualified entity, as, for instance, a common carrier, that the real beneficiary was unqualified as, for instance, a particular shipper. Cf. *Hairston* v. *Danville & W. Ry.*, 208 U. S. 598, 607. A case resembling the Parker Dam matter is *Wisconsin* v. *Duluth*, 96 U. S. 379, an original action in which the State of Wisconsin sued to enjoin the City of Duluth, Minnesota, from cutting a new outlet for the St. Louis River, a navigable stream emptying into Lake Superior in Wisconsin. It was claimed that the new works injuriously affected Wisconsin's sovereign interests. The city defended on the grounds, among others, that although this canal had been begun by it, the United States had taken it over and was in fact doing the work under Federal appropriations of funds. The Court sustained the defense, saying (p. 386):

> We do not feel called upon to make an argument to prove that these statutes of the Congress of the United States, and these acts of the Executive Department in carrying these statutes into effect, constitute an adoption of the canal and harbor improvement started by the City of Duluth, and a taking exclusive charge and control of it. That they amount to the declaration of the Federal government, that we here interpose and assert our power. We take upon ourselves the burden of this improvement, which properly belongs to us, and that hereafter this work for the public good is in our hands and subject to our control.

See also *South Carolina* v. *Georgia,* 93 U. S. 4, 13.

If the Government has authority to build the dam, that authority is not lessened by the incidental use of the reservoir thereby created for generation of power. Arizona has no interest in the Government's disposition of the power. *United States* v. *Chandler-Dunbar Co.,* 209 U. S. 447, 229 U. S. 53; *Arizona* v. *California,* 283 U. S. 423.

The defendant has referred to certain statutes which it contends limit the Secretary's authority.

The Indian Appropriation Act of April 4, 1910 (36 Stat. 269, 270) (not cited by the defendant), provides that

> hereafter no new project to cost in the aggregate to exceed thirty-five thousand dollars shall be undertaken on any Indian reservation or allotment without specific authority of Congress.

However, the Act of April 21, 1904 (33 Stat. 189, 224), constituted specific authority, and reenactment of it was not required. The Appropriation Act containing the quoted proviso contains also an appropriation of $50,000 toward securing an appropriation of water for the Colorado River Indian Reservation, negativing any abandonment of the 1904 program (36 Stat. at 273).

Section 8 of the Reclamation Act (Act of June 17, 1902, 32 Stat. 388), provides that nothing in that Act shall be construed as interfering with the laws of any State relating to the control, appro-

priation, etc., of water used in irrigation, and that the Secretary of the Interior shall proceed in conformity with such laws in carrying out the Act. But this provision was intended to protect water rights, not to control the erection of works for Federal purposes. *Arizona* v. *California, supra; Utah Power & Light Co.* v. *United States,* 263 U. S. 389, 410. For the history of this language see *Gutierres* v. *Albuquerque Land Co.,* 188 U. S. 545. The Federal Government's power to permit third parties to use the water stored by Parker Dam for irrigation might be affected by this statute, but not its power to build the dam for Federal purposes, as for example, the protection and reclamation of Indian lands (cf. *Winters* v. *United States, supra*), public lands (*United States* v. *Rio Grande Irrigation Co., supra*) or other Federal objects (*Arizona* v. *California, supra*).

Subsection B of the Act of December 5, 1924, (43 Stat. 701, 702), requires certain findings of feasibility before construction of a new project or division of a project. If this statute applies to projects previously authorized, such as the Colorado River Indian Reservation, the requisite finding is recited in Articles 4 and 5 of the contract between the Secretary and the Metropolitan Water District, printed in the Appendix, and is supported by reports on file in the Bureau of Reclamation made under the direction of Section 11 of the Boulder Canyon Project Act (45 Stat. 1057, 1063).

The defendant's brief cites Section 4 of the Act of June 25, 1910 (c. 407, 36 Stat. 836), which provides in part that:

> hereafter no irrigation project contemplated by said Act of June seventeenth, nineteen hundred and two, shall be begun unless and until the same shall have been recommended by the Secretary of the Interior and approved by the direct order of the President of the United States.

This statute applies to future projects initiated subsequent to its date. The irrigation of the lands of the Colorado River Indian Reservation was initiated March 2, 1867 (14 Stat. 514), when Congress appropriated $50,000 for that specific purpose.

But if this statute is construed as applying to projects previously authorized by Congress, such as the diversion of water for the Colorado River Indian Reservation authorized by the Act of April 21, 1904 (c. 1402, 33 Stat. 189, 224), the requirement appears to have been met by the proceedings had under the National Industrial Recovery Act (48 Stat. 195), outlined *infra*.

As to the authority of the Federal Emergency Administrator of Public Works.—Section 202 of the National Industrial Recovery Act (48 Stat. 195) authorizes the President, through an Administrator, to "prepare a comprehensive program of public works" including

> conservation and development of natural resources, including control, utilization, and purification of waters * * * development of water power, transmission of electrical energy, and construction of river and harbor improvements and flood control * * * Provided, that no river or harbor improvements shall be carried out unless they shall have heretofore or hereafter been adopted by the Congress or are recommended by the Chief of Engineers of the United States Army * * *.

Section 203 authorizes the President

> through the Administrator or through such other agency as he may designate or create, (1) to construct, finance, or aid in the construction or financing of any public-works project included in the program prepared pursuant to Section 202.

Executive Order No. 6252, August 16, 1933, delegated authority to the Federal Emergency Administrator of Public Works in substantially the language of Sec. 203, i. e., "to construct, finance, or aid in the construction or financing of any public-works project included in the program prepared", etc. The bill alleges that in the exercise of that authority the Administrator included Parker Dam in the comprehensive program. The same executive order (Sec. A 1) authorizes the Administrator "to utilize such Federal officers and employees * * * as he may

find necessary * * *." The Secretary of the Interior, in building Parker Dam, is thus constructing a project the authorization for which is derived from the 1933 Industrial Recovery Act as well as the Act of April 21, 1904, *supra,* and is an officer whom the Administrator is authorized to designate as the construction agency, independently of the authority the Secretary derived from the 1921 "Contributed Funds" statute (Act of Mar. 4, 1921, 41 Stat. 1404) and the Act of February 21, 1911 (36 Stat. 926).

Section 201 of the Recovery Act authorizes the President to perform all functions under Title II thereof through the Administrator. The Administrator was thereby authorized to give the "direct order" referred to in section 4 of the Act of June 25, 1910 (c. 407, 36 Stat. 836), if that order was required here.

The brief of the defendant (p. 35) lays stress on the fact that Parker Dam was not included in the "comprehensive program" until December 28, 1933, ten months after execution of the contract with the Metropolitan Water District. This has no bearing on the authority of the Administrator. He is authorized to construct works for which no financing agreement whatever has been made. He is authorized to utilize other Government agencies, such as the Secretary of the Interior, in so doing. From the bill it appears that construction was not started until after Congress had conferred this

authority. Its scope is not impaired by the fact that for ten months previously a financing agreement with the District, which was not essential to the Administrator's authority, had remained executory.

As to the Chief of Engineers.—Parker Dam, under the allegations of the bill, falls within several of the categories of projects authorized by Section 202 of the National Industrial Recovery Act, *supra;* that is, (1) control, utilization, and purification of waters; (2) development of water power; (3) construction of river and harbor improvements; (4) flood control. As to one of these, the construction of river and harbor improvements, a proviso requires that "no river or harbor improvements shall be carried out unless they shall have heretofore or hereafter been adopted by the Congress or are recommended by the Chief of Engineers of the United States Army." Both of these alternatives have been complied with: the Act of April 21, 1904, *supra,* constitutes an "adoption by the Congress" of a program for diverting water for the Colorado River Indian Reservation, and the bill alleges that the Project has been recommended by the Chief of Engineers. His recommendation appears in the Appendix.

The defendant's brief (p. 17) apparently confuses the functions of the Chief of Engineers under the Act of March 3, 1899 (30 Stat. 1151), and under the National Industrial Recovery Act, *supra.* The

former prohibits the erection of structures in navigable waters without the approval of the Chief of Engineers and the Secretary of War. It applies only to private parties, not to the United States, and is consequently not involved in this case. Under the Recovery Act the "recommendation" of the Chief of Engineers is not the mere negative finding required under the 1899 Act; it is a new and affirmative basis for the inclusion of a project in a Federal construction program, having the same effect under the recognition given to it by that statute as the designation of that particular project by an Act of Congress. The cases cited by the defendant as to the limited effect of the "approval" of a project by the Chief of Engineers under the 1899 statute are not in point; he is proceeding here under a much broader delegation of power, and with regard to a Federal, not a private, project.

The defendant's brief states that the Chief of Engineers' action was taken shortly before this suit was filed, and in contemplation of it. While the recommendation of the Chief of Engineers is not required to bring this project within the comprehensive program of Public Works as a project for "control, utilization and purification of water", it is recognized that the Court, in considering the dam's relation to reclamation and flood control, must necessarily consider its effect on navigation, and to that end the procedure necessary to bring that phase of the matter before the Court has been complied with.

PART II. ON THE APPLICATION FOR A TEMPORARY RESTRAINING ORDER

I

THE BILL OF COMPLAINT STATES A CAUSE OF ACTION ENTITLING THE UNITED STATES TO A PERMANENT INJUNCTION

The argument upon this point has been presented in relation to the motion to dismiss the bill of complaint.

II

THE UNITED STATES WILL SUFFER IRREPARABLE INJURY IF THE STATE OF ARIZONA IS PERMITTED TO CONTINUE ITS FORCIBLE PREVENTION OF CONSTRUCTION PENDING FINAL DETERMINATION OF THIS SUIT

First. The use of militia by a State to prevent procedure by a Federal agency, in lieu of resort by the State to the process of the Court, should not be sanctioned. Whatever the final outcome of this case may be, this method of obstruction should be restrained pending the orderly consideration by this Court of the defendant's motion to dismiss the bill of complaint and of the further proceedings that may be had in this case. The defendant's brief (p. 9) itself states;

> Likewise, it might well be said that Arizona has at all times had available its remedy in the ordinary and orderly course of judicial proceedings and it was not necessary for it to forcibly stop construction, whatever it might have thought of the wisdom of such a course or of its rights in the premises.

Second.—The showing of irreparable injury made by the Government's bill of complaint and the affidavits of the Secretary of the Interior and the Commissioner of Reclamation is not rebutted and is scarcely denied. It is not denied that the construction of Parker Dam requires the excavation of the river bed to a depth of more than 240 feet; that this operation involves great hazard; that it can be successfully carried out only by complete control of the flow of the Colorado River; that for only a limited time the whole flow of the river (except releases for irrigation requirements) will be impounded by Boulder Dam; that Arizona's use of force has already cost two and one-half months (now three months) of this limited construction time; and that the successful completion of the work requires immediate resumption. The defendant's brief (pp. 27, 28) specifically admits that "enormous advantages accrue to the United States" by the construction of Parker Dam, and fails to deny that the whole project must be carried forward without further delay if it is to be successfully completed, and that the favorable conditions now existing because of the filling of Boulder Dam reservoir can never be duplicated.

Instead of traversing these statements, the defendant recounts in detail its controversy with other States and with the United States over the use of Colorado River water, and particularly its opposition to the Metropolitan Water District.

No question of water rights is involved in this application for a restraining order. Construction of Parker Dam does not of itself interfere with such appropriations of water as may lawfully be made in Arizona. A determination of the Government's right to build the dam would not of necessity include a determination of whatever right of diversion may be held by the District or by Arizona, nor would an adjudication upon diversion rights necessarily include a decision on the Federal power to construct the dam. The Supreme Court settled in *Arizona* v. *California*, 283 U. S. 423, that the question of whether the Government has authority to erect a dam has nothing to do with relative rights to appropriate water. The United States may build Parker Dam even if the District may not divert water. Cf. *Utah Power & Light Co.* v. *United States*, 243 U. S. 389, 410, 411. Whatever interest Arizona may have in the operation of Parker Dam after its construction may be submitted to the Court later. As this Court said in *Arizona* v. *California*, 283 U. S. 423, 463:

> If by operations at the dam any then perfected right of Arizona, or those claiming under it, should hereafter be interfered with, appropriate remedies will be available.

And (283 U. S. 423, 463):

> There is no occasion for determining now Arizona's rights to interstate or local waters which have not yet been, and which may never be, appropriated.

A further and additional reason why a restraining order should issue forthwith is that the forcible interference by the defendant with the construction of the dam is an interference with the exercise by the Government of a power conferred upon it by the Constitution. Any such interference should be restrained whenever or by whomsoever attempted. If the existence of the power is determined and the fact of the forcible resistance of its exercise is not denied, the power is entitled to immediate protection by this Court. Whatever may be the further course of this case or its ultimate determination, Arizona should be temporarily restrained pending final determination of the case.

CONCLUSION

The defendant's Motion to Dismiss the Bill of Complaint should be denied.

The plaintiff's application for an order restraining all interference by the defendant, the State of Arizona, its officers, agents, and employees, with the construction of Parker Dam pending final determination of this action, should be granted.

Respectfully submitted.

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DAVID B. HEMPSTEAD,
Special Assistant to the Attorney General.

FEBRUARY 1935.

APPENDIX

UNITED STATES DEPARTMENT
OF THE INTERIOR,
BUREAU OF RECLAMATION.

BOULDER CANYON PROJECT

COOPERATIVE CONTRACT FOR CONSTRUCTION AND OPERATION OF PARKER DAM

1. This contract, made this 10th day of February, 1933, pursuant to the act of Congress approved June 17, 1902 (32 Stat. 388), and acts amendatory thereof or supplementary thereto, all of which acts are commonly known and referred to as the Reclamation Law, and particularly pursuant to the act of Congress approved March 4, 1921 (41 Stat. 1367, 1404), section 25 of the act of Congress approved April 21, 1904 (33 Stat. 189, 224), and the act of Congress approved December 21, 1928 (45 Stat. 1057), designated the Boulder Canyon Project Act, and the "Metropolitan Water District Act" of the Legislature of the State of California (Stats. 1927, Chap. 429), as amended, particularly section 5, subdivision (9) thereof, between THE UNITED STATES OF AMERICA, hereinafter referred to as the United States, acting for that purpose by Ray Lyman Wilbur, Secretary of the Interior, hereinafter styled the Secretary, and THE METROPOLITAN WATER DISTRICT OF SOUTHERN CALI-

FORNIA, a public corporation, hereinafter referred to as the District, organized and existing under and by virtue of the laws of the State of California:

WITNESSETH:

EXPLANATORY RECITALS

2. WHEREAS, these parties have heretofore on April 24, 1930, and September 28, 1931, entered into two contracts entitled respectively "Contract for Delivery of Water," and "Supplementary Contract for Delivery of Water," which said contracts provide, among other things, for the delivery by the United States to the District each year from the Boulder Canyon Reservoir of quantities of water at a point in the Colorado River immediately above the District's point of diversion (at or in the vicinity of the proposed Parker Dam hereinafter referred to), and have also entered into two contracts (dated April 26, 1930, and May 31, 1930), for the purchase by the District from the United States of certain quantities of electrical energy to be generated at Hoover Dam, for the pumping of said water into and in an aqueduct to be constructed by the District; and

3. WHEREAS, the said point of delivery and the proposed Parker Dam are approximately ten (10) miles above the boundaries of the Colorado River Indian Reservation, as designated by the act of Congress approved March 3, 1865 (13 Stat. 559), and there are now being irrigated, by pumping, approximately 6000 acres of land within said reservation, and water has been reserved and appropriated, pursuant to said act as amended or supplemented and particularly by the act of April 4,

1910 (36 Stat. 273), for additional lands within said reservation susceptible of irrigation from the Colorado River, the reclamation of which will require diversion from the River by construction of a dam, or by pumping or both, and will require drainage of said lands by pumping, for all of which electrical energy is needed; and

4. WHEREAS, there are also in Arizona additional public and other lands in the vicinity of said reservation and also in the Gila Valley, susceptible of irrigation from the Colorado River, but requiring pumping for such purposes, for which electrical energy will be needed, and the United States has now under way an investigation of possible reclamation of such areas as authorized by section fifteen (15) of the said Boulder Canyon Project Act; and

5. WHEREAS, the reclamation of said Indian and public and other lands will be rendered more feasible by the availability of stored water and electrical energy at the proposed Parker Dam, and the floods of the tributaries of the Colorado River between Hoover Dam and Parker Dam will be controlled, and navigation improved, by said dam; and

6. WHEREAS, the Secretary if authorized by said act of April 21, 1904 (33 Stat. 224), to build the proposed Parker Dam for the reclamation of all or any portion of the irrigable lands on the Yuma and Colorado River Indian Reservations in California and Arizona; and such authority has been reserved in the Arizona Enabling Act (act of June 20, 1910, 36 Stat. 570, 575), and

7. WHEREAS, the District is engaged in a project involving the construction of an aqueduct for the purpose of diverting and conveying water from the Colorado River to the metropolitan area of Southern California for domestic, municipal, and other useful purposes, and as a means of such diversion, desires storage in the main stream of the Colorado River at the site of the proposed Parker Dam, for the purpose, among others, of desilting water, reducing pump lift, and developing incidental electrical energy for pumping water into and in said aqueduct and other uses subordinate to the said aqueduct project, and the District desires to utilize the proposed Parker Dam in common with the United States and is willing to pay to the United States the entire capital cost of construction of said dam, as hereinafter set forth, and is further willing that one-half of the power privilege created by said dam shall be reserved to the United States for the purposes of irrigation and drainage of lands in Arizona within the Colorado River Indian Reservation, as now constituted, and the Gila or Gila-Parker Project without contribution by the United States to the capital cost of the proposed dam, as hereinafter set forth, and is also willing that the dam be utilized by the United States for the storage and diversion of water for the requirements of Indian, public and other lands in Arizona; and

8. WHEREAS, the Secretary is authorized by the act of Congress approved March 4, 1921, to receive moneys from the District as aforesaid and to effect therewith the construction of the proposed works as though said moneys were specifically appropriated for said purposes; and

9. Whereas funds are not otherwise available for the construction by the United States of said dam and the provision of storage and diversion facilities and of appurtenant works for the irrigation and drainage of said Indian, public, and other lands in Arizona and the cooperative construction of the said dam and works, as herein provided, will be mutually advantageous to the parties hereto, and the cost of said dam and appurtenant works will be materially less if constructed during the period of completion of the Hoover Dam now under construction than would otherwise be the case;

NOW, THEREFORE, in consideration of the mutual covenants herein contained, the parties hereto agree as follows, to wit:

CONSTRUCTION BY THE UNITED STATES

10. The United States will, with funds advanced by the District as hereinafter provided, and for the purposes stated in this contract, construct in the main stream of the Colorado River at a point in the vicinity of Parker, Arizona, shown on the map attached hereto and described herein as Exhibit "A", a dam, referred to herein as the Parker Dam, creating thereby a storage reservoir having a maximum water surface elevation of approximately four hundred fifty (450) feet above sea level (U. S. Geological Survey datum). Upon like conditions the United States will also construct outlet works, pressure tunnels, penstocks, and other appurtenant structures to the extent that such structures may be necessary and/or economically desirable as parts of the original installation, and such facilities for navigation as the Secretary may find

necessary. All buildings intended solely for the use of either party hereto shall be constructed at the sole expense of the party for whom such facilities shall be provided. The dam and appurtenant structures shall be so constructed that subsequent installation of diversion or outlet works shall be possible in the most feasible manner for canal connections with lands within the Colorado River Indian Reservation and with public and other lands in Arizona now or hereafter included in projects constructed under the Reclamation Law and supplementary legislation, or otherwise, subject to the consent and approval of the Secretary, and if either party hereto requires it, so that one-half of the total installed capacity of electrical generating equipment may be located upon the Arizona side of the river and one-half on the California side. Outlet works, pressure tunnels, penstocks, connections for canals, and appurtenant structures not required by the District shall be completed under this contract only to the extent necessary to permit their subsequent completion and use without risk of damage to the remainder of the work.

In carrying out the proposed work hereunder and in acquiring supplies, materials, and equipment therefor, the United States may proceed directly under the method commonly referred to as force account, or may proceed by construction contract. In the event that such contract or contracts shall be let with reference to the construction of said dam, or the acquisition of supplies, materials, or equipment therefor, the letting of such contracts shall be governed by the provisions of Section 3709, United States Revised Statutes.

FUNDS TO BE PROVIDED BY THE DISTRICT

11. The District will advance to the United States, not to exceed the sum of Thirteen Million Dollars ($13,000,000), or so much thereof as may be (a) the cost of preparation of plans and specifications described in Article 13 hereof; (b) the actual cost of the said dam, including acquisition of lands and rights-of-way for reservoir and other incidental purposes, outlet works, pressure tunnels, and penstocks, to be constructed hereunder, and of the District's proportionate share as determined by the Secretary, of such power-plant buildings and generating, transforming, and high-voltage switching equipment as may be installed for the joint use of the United States and the District, and (c) required to meet any overhead and general expense incurred by the United States in carrying out this contract.

Said funds will be furnished to the United States by payment from time to time to the Secretary or such fiscal agent as he may designate in advance of expenditure thereof by the United States. The Secretary will submit estimates of the monthly anticipated expenditures not less than sixty (60) days in advance, and the District will then advance the amount not less than thirty (30) days prior to the month in which such funds shall be estimated to be required. If the United States effects such construction by contract, such contract shall recite that the United States shall not be liable for any loss occasioned by the failure of the District to advance funds as herein provided. The District agrees to hold the United States harmless from all claims whatsoever arising from any such failure. If the

funds provided by the District are at any time insufficient, the United States will stop work (if proceeding under force accounts), when the funds so advanced are exhausted, or give notice to the construction contractor to stop work (if proceeding by construction contract), when the funds so provided are about to be exhausted, and will not resume or give notice to resume work until additional and sufficient funds are provided by the District; and, in any event, the United States shall not be obligated by this agreement beyond the expenditure of the amount actually provided by the District, whether the proposed works are completed or not. The failure of the District to provide funds shall not impose any liability on the District other than to hold the United States harmless from the consequences thereof, but the United States may be relieved, at its option, of any obligation under this contract, if such failure continues for twelve (12) successive months, after submission of estimate therefor, by the Secretary's giving the District written notice of the termination of any further obligation of the United States hereunder.

The cost of the proposed works shall embrace all expense of whatever kind growing out of or resulting from said works, including any overhead and general expense (as conclusively estimated by the Secretary) incurred by the United States in carrying out this contract. Nothing contained in this article is to be construed as obligating the United States to expend or Congress to appropriate money for any share of (a) said power-plant buildings or (b) said generating, transforming, and high-voltage switching equipment intended for the joint use of the parties hereto.

NO OBLIGATION BY THE UNITED STATES TO PAY FOR WORKS CONSTRUCTED

12. The United States shall not be under any obligation to repay to the District, or otherwise contribute toward, the cost of any works built with funds provided by the District.

PREPARATION OF PLANS AND SPECIFICATIONS

13. The designs and specifications for all construction or other work under this contract (including exploratory and preparatory work) shall be prepared by the United States with the cooperation of and at the cost of the District, and shall be approved in writing by the General Manager and Chief Engineer of the District, or such other officer as the Directors thereof may designate, prior to performance thereof or the letting of contracts for such work.

DURATION OF CONTRACT

14. Upon written notice from the District to the Secretary that funds will be available to carry out the work to be constructed hereunder, the United States agrees to submit within thirty (30) days following such notice its first estimate of funds required during the first thirty (30) days of work hereunder and to proceed thereafter with reasonable diligence. It is contemplated that as far as practicable, the proposed works shall be constructed coincidentally with the construction of Hoover Dam and the filling of the reservoir thereby created, and that any contract let by the United States for the erection of Parker Dam shall so provide; but neither the United States nor the District shall incur liability to the other through the noncomple-

tion of said works within said period. This contract shall terminate on December 31, 1945, unless prior thereto the District shall have advanced sufficient funds for all works to be constructed by the United States hereunder, and in the event of such termination, all rights of the District under this contract shall cease, and the uncompleted works, together with the rights to the use thereof, shall vest in the United States.

POWER AND OTHER PRIVILEGES

15. (I) The interests of both parties require, and it is agreed, that the water surface of the reservoir to be created by Parker Dam shall be maintained as nearly as possible at a level of 450 feet above sea level (U. S. Geological Survey datum) at the dam.

II. It is agreed that the United States shall have and may exercise the following rights and such incidental authority as may be necessary to make them effective:

(*a*) The right to control all water passing the dam; provided, however, that the water level stated in Article 15 (I) hereof shall not be arbitrarily reduced but may be temporarily reduced from time to time to a minimum elevation of 440 feet above sea level, and the water level shall not be reduced below said minimum level except in cases of emergency affecting the safety of the said dam and appurtenant works.

(*b*) The right, without contribution to the cost of the dam built under this contract, to one-half the power privilege created thereby for use in the irrigation and drainage of lands in Arizona within the Colorado River Indian Reservation as now

constituted and the Gila or Parker-Gila Project, as determined by the Secretary, and for other purposes incidental to said Colorado River Indian Reservation and Gila or Parker-Gila Project; that is to say, the right to pass through such generating equipment as it may install one-half the total available flow at the dam at any given time, after deductions for diversions being made above the dam for the District's aqueduct and for the irrigation of (1) the Colorado River Indian Reservation, as now constituted, and (2) public and other lands in Arizona now or hereafter included in projects constructed under the Reclamation Law and supplementary legislation, or otherwise, subject to the consent and approval of the Secretary, and the right to so utilize such portion of the balance of the power privilege as aforesaid as may not be used by the District for the time being.

(*c*) The right to connect with such transmission system as the District may construct for the purpose of utilizing any power transmission capacity in excess of the District's requirements, for the transmission of power from Hoover Dam to Parker Dam for general use within the Colorado River Indian Reservation, as now constituted, and Gila or Parker-Gila Project, as determined by the Secretary; provided that such excess capacity shall be subject to reasonable operating conditions fixed by the District, and that the United States shall pay to the District the cost of transmission of such power as may be transmitted by use of such excess capacity hereunder;

(*d*) The right to connect with the Parker Dam and/or the reservoir created thereby by means of a canal (including such outlet and diversion features

at Parker Dam as may be necessary or advisable) with lands within the Colorado River Indian Reservation, as now constituted, and with public and other lands in Arizona or California, now or hereafter included in projects constructed under the Reclamation Law and supplementary legislation, or otherwise, subject to the consent and approval of the Secretary, and the right to thereby divert such quantities of water as may be consistent with the Colorado River Compact and the Boulder Canyon Project Act.

III. It is agreed that the District shall have and may exercise the following rights and such incidental authority as may be necessary to make them effective:

(*a*) The right to one-half of the power privilege created by the proposed Parker Dam for the purpose of developing electrical energy for pumping water into and in the said aqueduct and other uses incidental to said aqueduct project in California; that is to say, the right to pass through such generating equipment as it may install, one-half the total available flow at the dam at any given time, after deductions for diversions being made above the dam for the District's aqueduct and for the irrigation of (1) the Colorado River Indian Reservation, as now constituted, and (2) public and other lands in Arizona, now or hereafter included in projects constructed under the Reclamation Law and supplementary legislation, or otherwise, subject to the consent and approval of the Secretary, and the right to utilize for said purpose such portion of the balance of the power privilege as afore-

said as may not be used by the United States for the time being.

(*b*) The right to divert water from the said Parker Dam and/or the reservoir created thereby, by means of an aqueduct, canal, or other appropriate works (including such outlet and diversion features at Parker Dam as may be necessary or advisable) for domestic, municipal, and other beneficial use within the area of the District, as now or hereafter constituted, in California, and to thereby divert such quantities of water as may be consistent with the Boulder Canyon Project Act, the Colorado River Compact, and the said contracts heretofore entered into between the United States and the District and described and referred to in Article 2 hereof.

INSTALLATION OF MACHINERY

16. Machinery and equipment for generating, transforming, and high-voltage switching of energy for the sole use of the District shall be installed, owned, and operated by the District at its own expense. The District shall not be liable for the cost of generating or other electrical equipment installed for the sole use of the United States.

OPERATION AND MAINTENANCE OF RESERVOIR, DAM, AND OUTLET WORKS

17. The United States will operate and maintain the reservoir, dam, and outlet works, to, but not including, shut-off valves, and reserves the right to direct the control of all water passing the dam for any and all purposes; provided that contracts now

in force between the parties hereto shall not be thereby impaired. So long as the United States shall make no use of the reservoir, the cost of operation and maintenance (which shall include repairs and replacements and a reasonable amount, as determined by the Secretary, for general expenses and overhead, but excluding contingent liabilities and/or damages) shall be paid monthly in advance by the District to the United States within sixty (60) days of submission of estimates therefor. If and when the United States shall use or authorize the use of said reservoir for diversion of water and/or development of power, the annual cost of maintenance and operation of the reservoir and dam (as hereinabove in this paragraph limited and defined) shall be pro-rated upon the basis of the diversions by each party into their respective aqueducts, canals, and power plants, and shall be paid in direct proportion to the uses so made by the District and the United States.

OPERATION AND MAINTENANCE OF POWER PLANT AND POWER PLANT BUILDINGS

18. The District will operate and maintain at its own cost all buildings and equipment used solely by it for the generation of electrical energy, from and including shut-off valves. The United States will operate and maintain at its own cost all buildings and equipment used solely by the United States for the generation of electrical energy, subject to the availability of appropriations therefor by Congress, and said operation and maintenance shall be effected by the United States through such agency as the Secretary shall designate.

TITLE

19. Title to the dam and all other structures erected by the United States, whether utilized by it or by the District, or by both, shall remain in the United States.

UNITED STATES TO BE HELD HARMLESS

20. The District agrees to save the United States, its officers, agents, and employees harmless from all claims whatsoever arising out of the construction and maintenance of said dam, and from all claims whatsoever arising out of such operation thereof as may be necessitated by the requirements of the District. The District agrees to pay all damages resulting from the flooding of lands, and, to the extent that lands within the Chimehuevi Indian Reservation are damaged, payment therefor will be made to the United States for the benefit of said Reservation.

ACCESS TO WORK AND TO BOOKS AND RECORDS

21. Accredited officers of the District shall have the right of ingress to and egress from all work done under this contract, both in progress and after completion, and the right at all reasonable hours to examine and make copies of any books, records, drawings, or specifications thereof; and the United States shall have a like right as to all pertinent books, records, drawings, and specifications of the District. Upon demand and at not less than thirty-day intervals, the United States will furnish to the District detailed statement of all costs and expenditures in connection with and/or chargeable against the proposed Parker Dam Project.

EXISTING CONTRACTS BETWEEN THE UNITED STATES AND THE DISTRICT NOT AFFECTED

22. Existing contracts between the United States and the District shall remain in full force and effect and unaltered by the provisions of this agreement.

TRANSFER OF INTEREST IN CONTRACT

23. No voluntary transfer of this contract, or of the rights hereunder, shall be made without the written approval of the Secretary; and any successor or assign of the rights of the District, whether by voluntary transfer, or otherwise, shall be subject to all the conditions of the Reclamation Law and supplementary legislation, and also subject to all the provisions and conditions of this contract, to the same extent as though such successor or assign were the original contractor hereunder.

RULES AND REGULATIONS

24. This contract is subject to such rules and regulations, conforming to the Reclamation Law and supplementary legislation and other statutes cited in this contract, as the Secretary may from time to time promulgate; *Provided,* however, that no right of the District hereunder shall be impaired or obligation of the District hereunder shall be extended thereby; and *Provided further,* that opportunity for hearing shall be afforded the District by the Secretary prior to promulgation or modification of any such rules and regulations.

AGREEMENT SUBJECT TO COLORADO RIVER COMPACT

25. This contract is made upon the express condition and with the express understanding that all rights hereunder shall be subject to and controlled by the Colorado River Compact, being the compact or agreement signed at Santa Fe, New Mexico, November 24, 1922, pursuant to the Act of Congress approved August 19, 1921 (42 Stat. 171), entitled "An Act to permit a compact or agreement between the States of Arizona, California, Colorado, Nevada, New Mexico, Utah, and Wyoming, respecting the disposition and apportionment of the waters of the Colorado River, and for other purposes," which Compact was approved in Section 13 (a) of the Boulder Canyon Project Act.

DISPUTES AND DISAGREEMENTS

26. Whenever a controversy arises out of this contract, and if the disputants then agree to submit the matter to arbitration, the District shall name one arbitrator and the Secretary shall name one arbitrator, and the two arbitrators thus chosen shall elect three other arbitrators, but in the event of their failure to name all or any of the three arbitrators within five (5) days after their first meeting, such arbitrators, not so elected, shall be named by the Senior Judge of the United States Circuit Court of Appeals for the Ninth Circuit. The decision of any three of such arbitrators shall be a valid and binding award of the arbitrators.

MEMBER OF CONGRESS CLAUSE

27. No Member of or Delegate to Congress or Resident Commissioner, shall be admitted to any share or part of this contract, or to any benefit that may arise therefrom. Nothing, however, herein contained shall be construed to extend to this contract if made with a corporation for its general benefit.

IN WITNESS WHEREOF, the parties hereto have caused this contract to be executed the day and year first above written.

THE UNITED STATES OF AMERICA,
By RAY LYMAN WILBUR,
Secretary of the Interior.

THE METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA,
[SEAL] By W. P. WHITSETT,
Chairman of the Board of Directors.

Attest:
NORTHCUTT ELY.

Approved as to Form:
By JAMES H. HOWARD,
General Counsel.

Attest:
A. L. GRAM,
Secretary of the Board of Directors.

Colorado River Indian Reservation, Arizona and California, Acts Appropriating Funds Therefor

Date of Act	Statute Reference	Amount
Mar. 2, 1867	(14 Stat. 514)	$30,000
Jul. 27, 1868	(15 Stat. 222)	50,000
May 29, 1872	(17 Stat. 188)	20,000
Mar. 3, 1911	(36 Stat. 1063)	18,000
Aug. 24, 1912	(37 Stat. 523)	35,000
Jun. 30, 1913	(38 Stat. 85)	25,000
Aug. 14, 1914	(38 Stat. 587)	15,000
May 18, 1916	(39 Stat. 129)	15,000
Mar. 2, 1917	(39 Stat. 974)	15,000
May 25, 1918	(40 Stat. 568)	70,000
Jun. 30, 1919	(41 Stat. 10)	188,000
Feb. 14, 1920	(41 Stat. 415)	86,000
Mar. 3, 1921	(41 Stat. 1232)	86,000
May 24, 1922	(42 Stat. 566)	65,000
Jan. 24, 1923	(42 Stat. 1187)	65,000
Jun. 5, 1924	(43 Stat. 401)	55,000
Mar. 3, 1925	(43 Stat. 1152)	20,000
May 10, 1926	(44 Stat. 463)	15,000
Jan. 12, 1927	(44 Stat. 944)	10,000
Mar. 7, 1928	(45 Stat. 212)	5,000
Mar. 4, 1929	(45 Stat. 1573)	18,000
May 14, 1930	(46 Stat. 290)	25,000
Feb. 14, 1931	(46 Stat. 1126)	8,000
Feb. 2, 1932	(47 Stat. 21)	7,500
Apr. 22, 1932	(47 Stat. 100)	20,000
Feb. 17, 1933	(47 Stat. 829)	12,010
Mar. 2, 1934	(48 Stat. 370)	10,200
Total		$1,073,710

Recommendation of Parker Dam and Appurtenant Works Under National Industrial Recovery Act

Whereas The Secretary of the Interior and the Federal Emergency Administrator of Public Works have made provision for the construction of a dam and appurtenant works in the main stream of the Colorado River, to be known as Parker Dam and to be located about one-half mile below the confluence of the Bill Williams River and the Colorado River, for the following purposes, among others:

1. Reregulation of waters discharged at Boulder Dam in power operations and in response to irrigation demands, in order, by such reregulation, to equate the flow of the Colorado River in aid of navigation and flood control, and to conserve said waters for other beneficial uses;

2. Control of floods of the Bill Williams River (the flow of which ranges from a minimum of 9 cubic feet per second to a maximum of more than 50,000 cubic feet per second) in aid of navigation and protection of federal property from damage by floods;

3. Control of scouring action of the clear waters released at Boulder Dam on the bed of the Colorado River, and prevention of injury to navigation by disturbance of normal low water levels thereby;

4. Other purposes in aid of the reclamation and use of property of the United States.

AND WHEREAS, The Secretary of the Interior and the Federal Emergency Administrator of Public Works have submitted for examination and approval plans, specifications, drawings, and maps of location of said structure and certain appurtenant works; copies of which are hereto attached;

NOW THEREFORE, Pursuant to the authority conferred by Section 202 of Title II of the National Industrial Recovery Act, this is to certify that the said project, constituting Parker Dam, reservoir and appurtenant works is duly recommended by the Chief of Engineers of the United States Army and the inclusion thereof in the comprehensive program of Public Works referred to in said Title is approved; and said recommendation is approved by the Secretary of War.

WITNESS my hand this 4th day of January 1935.

E. M. MARKHAM,
Major General,
Chief of Engineers.
(illegible initials.)

WITNESS my hand this 5th day of January 1935.

GEO. H. DERN,
Secretary of War.

Appropriation Acts for Flood Control on Colorado River Below Site of Parker Dam

The Act of Congress of March 3, 1925 (43 Stat. 1186), authorizes an appropriation of $650,000 for Colorado River front work to protect the Yuma Federal Reclamation project. An appropriation in accordance with this authority is made in the Act of July 3, 1926 (44 Stat. 841, 857). The Act of Congress of January 21, 1927 (44 Stat. 1010, 1021), amends the Act of 1925, supra, and authorizes annual appropriations of $100,000 or so much thereof as may be necessary, for defraying the cost of Colorado River front work.

The Act of Congress of May 10, 1926 (44 Stat. 485), made $35,000 available for the Colorado River front work and levee system for the protection of the Yuma reclamation project. This provision was carried over in the Act of January 12, 1927 (44 Stat. 961).

The Act of Congress of February 14, 1931 (46 Stat. 1146), makes an appropriation of $100,000 to defray the cost of the Colorado River front work and levee system adjacent to the Yuma Federal irrigation project.

The Act of Congress of March 3, 1915 (38 Stat. 861), appropriates $100,000 for Colorado River front work.

The Act of Congress of January 12, 1927 (44 Stat. 961), appropriates $35,000 for Colorado River front work.

The Act of Congress of March 7, 1928 (45 Stat. 231), appropriates $100,000 for Colorado River front work.

The Act of Congress of May 29, 1928 (45 Stat. 903), appropriates $72,640 for Colorado River front work.

The Act of Congress of March 4, 1929 (45 Stat. 1593), appropriates $100,000 for Colorado River front work.

The Act of Congress of May 14, 1930 (46 Stat. 310), appropriates $100,000 for Colorado River front work.

The Act of Congress of February 14, 1931 (46 Stat. 1146), appropriates $100,000 for Colorado River front work.

The Act of Congress of April 22, 1932 (47 Stat. 118), authorizes expenditures of unexpended balances for Colorado River front work.

The Act of Congress of February 17, 1933 (47 Stat. 845), authorizes an appropriation of $48,000 for Colorado River front work.

The Act of Congress of March 2, 1934 (48 Stat. 362), authorizes the expenditure of the unexpended balance on Colorado River front work.

In 1906 there was a disastrous break in the banks of the Colorado River, and the River was pouring into the Imperial Valley, threatening to make a lake of this area. The Southern Pacific Company closed the break. In the Act of Congress of May 26, 1924 (43 Stat. 171), the Company was authorized to sue the United States in the Court of Claims for the work so done. A judgment of $1,012,665.57 was recovered (68 Court of Claims 223).

The Act of Congress of July 13, 1892 (37 Stat. 108), appropriates $10,000 for "Improving Colorado River by construction of a levee on the Gila River near its junction with the Colorado River at Yuma, Arizona, so as to confine the waters to the channel of said rivers."

References in Printed Reports of the Secretary of the Interior Relative to the Operations of the Bureau of Reclamation Regarding "Contributed Funds"

The following references are found in the Secretary's printed Annual Reports in regard to contributed funds:

24th An. Rep., 1924–1925, page 127, under "Appendix, Consolidated Financial Data, Construction Account, *Contributed Funds, $1,023,597.64.*"

Under the same heading and on page 105 of the 25th An. Rep., 1925–1926, *"Contributed Funds, $1,024,073.13."*

Under the same heading and on page 35 of the 26th An. Rep., 1926–1927, *"Contributed Funds, $1,174,306.49."*

Under the same heading and on page 31 of the 27th An. Rep., 1927–1928, *"Contributed Funds, $1,248,813.73."*

Under the same heading and on page 37 of the 28th An. Rep., 1928–1929, *"Contributed Funds, $1,320,870.80."*

Under the same heading and on page 53 of the 29th An. Rep. 1929–1930, *"Contributed Funds, $1,428,906.38."*

Under the same heading and on page 60 of the 30th An. Rep. 1930–1931, *"Contributed Funds, $1,457,959.63."*

Under the same heading and on page 77 of the 31st An. Rep. 1931–1932, *"Contributed Funds, $1,614,552.76."*

Under the same heading and on page 37 of the 32nd An. Rep. 1932–1933, *"Contributed Funds, $1,733,552.76."*

Under the same heading and on page 47 of the 33rd An. Rep. 1933–1934, *"Contributed Funds, $1,783,013.08."*

Department of the Interior, Bureau of Reclamation.

Statement of Contributed Funds Act of March 4, 1921

State	Project	Contributed funds
Arizona	Yuma	$101,113.89
California	Orland	1,600.00
Colorado	Grand Valley	210,500.00
Idaho	Boise	3,865.68
Do	King Hill	8,025.66
Do	Minidoka	856,778.09
Do	Minidoka-Gooding	1,000.00
Montana	Huntley	717.64
Do	Sun River	184.47
Wyoming	North Platte	33,782.28
Nevada	Newlands	1,453.05
New Mexico	Carlsbad	7,980.06
Do	Rio Grande	370,925.00
Oregon	Baker	5,000.00
Do	Owyhee	4,354.61
Do	Vale	5,000.00
Do	Umatilla	1,000.00
South Dakota	Belle Fourche	4,960.32
Utah	Salt Lake Basin	44,736.77
Do	Strawberry Valley	4,179.06
Washington	Yakima	63,736.50
Wyoming	Shoshone	1,900.00
Washington	Grand Coulee	80,000.00
Total		1,783,013.08

DEPARTMENT OF THE INTERIOR,
BUREAU OF RECLAMATION.

AMERICAN FALLS RESERVOIR—IDAHO (COOPERATIVE FINANCING)

(In the account books of the Bureau of Reclamation the amounts contributed by individual contractors for American Falls Reservoir were not carried as contributed funds.)

Total ---------- $3,366,880.11

U. S. GOVERNMENT PRINTING OFFICE: 1919

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SUPREME COURT OF THE UNITED STATES.

No. 18, Original.—October Term, 1934.

The United States of America, Plaintiff,
vs.
The State of Arizona, Defendant.

[April 29, 1935.]

Mr. Justice Butler delivered the opinion of the Court.

September 10, 1934, the United States, acting through Harold L. Ickes, Secretary of the Interior and Federal Emergency Administrator of Public Works, caused to be commenced the construction of the Parker Dam in the main stream of the Colorado River, the thread of which for a distance of about 237 miles is the boundary between Arizona and California. The site is 150 miles below the Boulder Dam, half a mile below the place where the Williams River flows into the Colorado and 10 miles north of the Colorado River Indian Reservation. Its ends rest on public lands of the United States in Arizona and California. Arizona objects to the construction of the dam, asserts that it may not lawfully be built without her consent and threatens the use of military force to stop the work. January 14, 1935, the United States filed its bill in equity perpetually to enjoin interference by the State. On plaintiff's motion this court directed defendant to show cause why a restraining order should not issue pending the final determination of the suit. Arizona filed a return consisting of an affidavit of the governor setting forth the grounds on which the State claims the right to prevent the construction of the dam in the part of the river bed that is easterly of the thread of the stream, a motion to dismiss the bill and a supporting brief. We heard counsel on plaintiff's application for a temporary injunction and defendant's motion to dismiss.

We come first to the question whether the complaint alleges facts sufficient to warrant an injunction against the State. The allegations will be better understood after brief reference to the Colorado River Compact[1] and the Boulder Canyon Project Act, 45 Stat. 1057.

[1]Printed in California Statutes, 1929, c. 1, § 1.

The Compact was made by California, Colorado, Nevada, New Mexico, Utah and Wyoming. Arizona was not a party. It was made to provide an equitable apportionment of the waters of the Colorado River system among the interested States, establish relative importance of different beneficial uses and secure the development of the Colorado River basin, the storage of its waters and protection against floods. After apportionment between defined basins lying above and below Lee Ferry and a declaration that the Colorado has ceased to be navigable for commerce and that the use of its waters for purposes of navigation should be subservient to uses for domestic, agricultural and power purposes, the Compact authorizes the waters of the system to be impounded and used for the generation of power and declares that use subservient to uses for agricultural and domestic purposes. It was approved by § 13 (a) of the Boulder Canyon Project Act and, by presidential proclamation, it took effect June 25, 1929. 46 Stat. 3000. The Act authorizes the Secretary of the Interior to construct a dam and incidental works in the Colorado at Boulder Canyon adequate to create a reservoir having a capacity of not less than 20,000,000 acre feet "and a main canal and appurtenant structures located entirely within the United States connecting the Laguna Dam, or other suitable diversion dam, which the Secretary . . . is hereby authorized to construct if deemed necessary or advisable by him upon engineering or economic considerations, with the Imperial and Coachella Valleys in California". § 1.[2] In a suit in this Court against the Secretary of the Interior and the States which were parties, Arizona unsuccessfully sought to have ratification of the Compact decreed to be unconstitutional and to enjoin construction of the Boulder Dam and the doing of anything under color of that Act. *Arizona* v. *California,* 283 U. S. 423.

The bill alleges that February 10, 1933, the United States, acting through the Secretary of the Interior, entered into a contract with the Metropolitan Water District of Southern California. The District agrees to pay to the United States the entire cost of the dam, assumed not to exceed $13,000,000. By the use of this money the United States agrees that, under the Reclamation Act, June 17,

[2]By §§ 12 and 14 of the Boulder Canyon Project Act, the Reclamation Law is defined to mean the Act of June 17, 1902, 32 Stat. 388, and Acts amendatory thereof and supplemental thereto, including the Boulder Canyon Project Act.

1902, 32 Stat. 388, and supplemental Acts, particularly those of April 21, 1904, 33 Stat. 224, March 4, 1921, 41 Stat. 1404, and December 21, 1928 (The Boulder Canyon Project Act)[3] it will construct the Parker Dam. The District is to have one-half the power privilege and the right to divert specified quantities of water. The United States is to have the right to the rest of the power, to divert water, to transmit power at cost over the District's lines from Boulder to Parker, and, by means of canals, to connect Parker Dam with lands in the Colorado River Indian Reservation in Arizona and with other lands in that State and in California.

Parker Dam will intercept waters discharged at Boulder Dam and the inflow of tributaries of the Colorado below that dam; raise the river level 72 feet and create a reservoir about 20 miles long, having capacity of 717,000 acre feet, and permit generation of approximately 85,000 horsepower of electricity. Operated with Boulder Dam, it will "reregulate and equate, in aid of navigation and river regulation," the waters discharged at Boulder Dam for flood control, power generation and irrigation; allow, for generation of power, the discharge at Boulder Dam of water which otherwise would have to be retained there in storage, and also conserve the waters there discharged.

The bill also alleges that heavy flash floods of the Williams River are a menace to the Colorado River Indian Reservation, to United States public lands and to navigation below Parker. The dam is designed to promote reclamation of the reservation lands and of public lands of the United States. The power privilege reserved by the United States is for the purpose of pumping water for irrigation of these lands.

To disclose grounds on which the United States claims the right to construct the dam, the bill sets out that at various times Congress has made appropriations amounting in all to more than $1,359,000 for construction of irrigation and diversion works for

[3]Other amendatory and supppplemental acts are: Acts of February 25, 1905, 33 Stat. 814; March 3, 1905, 33 Stat. 1032; April 16, 1906, 34 Stat. 116; June 12, 1906, 34 Stat. 259; June 27, 1906, 34 Stat. 519; June 11, 1910, 36 Stat. 465; June 25, 1910, 36 Stat. 835; February 21, 1911, 36 Stat. 925; February 24, 1911, 36 Stat. 930; August 13, 1914, 38 Stat. 686; June 12, 1917, 40 Stat. 149; October 2, 1917, § 10, 40 Stat. 300; February 25, 1920, § 35, 41 Stat. 450; May 20, 1920, 41 Stat. 605; June 10, 1920, § 17, 41 Stat. 1072; December 5, 1924, § 4, 43 Stat. 701, June 6, 1930, 46 Stat. 522.

the reservation;[4] that the above mentioned Act of April 21, 1904, authorized the Secretary of the Interior to divert the waters of the Colorado and to reclaim, utilize and dispose of land in the reservation which might be made irrigable by works constructed under the Reclamation Act, and that the Boulder Canyon Project Act appropriated moneys for surveys of the Parker-Gila reclamation project which, it is said, embraces the Indian reservation and certain public lands of the United States. And it is asserted that the Parker Dam project has been included by the Administrator in the comprehensive program of public works authorized by § 202, National Industrial Recovery Act, 48 Stat. 201; that, pursuant to that Act, the Chief of Engineers of the United States Army has recommended the construction and his recommendation has received the approval of the Secretary of War.

1. The bill alleges that the stretch of the Colorado between Arizona and California is navigable, and the motion to dismiss is dealt with on that basis. Arizona owns the part of the river bed that is east of the thread of the stream. *New Jersey* v. *Delaware*, 291 U. S. 361, 379 *et seq.* Her jurisdiction in respect of the appropriation, use and distribution of an equitable share of the waters flowing therein is unaffected by the Compact or federal reclamation law. But the title of the State is held subject to the power granted to Congress by the commerce clause, *United States* v. *Holt Bank*, 270 U. S. 49, 54-55, and under that clause Congress has power to cause to be built a dam across the river in aid of navigation. The Boulder Canyon Project Act is an example of the exertion of that power. *Arizona* v. *California*, *supra*, 451, 455-457. But no Act of Congress specifically authorizes the construction of the Parker Dam. Subject to an exception with which

[4] Act of March 2, 1867, 14 Stat. 514, appropriated $50,000 "For expense of collecting and locating the Colorado River Indians in Arizona, on a reservation set apart for them by" § 1, Act of March 3, 1865, 13 Stat. 559, "including the expense of constructing a canal for irrigating said reservation". For completing the canal, $50,000 was appropriated by the Act of July 27, 1868, 15 Stat. 222, and $20,000 by the Act of May 29, 1872, 17 Stat. 188. Section 3, Act of April 4, 1910, 36 Stat. 273, appropriated $50,000 "For the construction of a pumping plant to be used for irrigation purposes on the Colorado River Reservation, together with the necessary canals and laterals, for the utilization of water in connection therewith, for the purpose of securing an appropriation of water for the irrigation of approximately one hundred and fifty thousand acres of land . . . to be reimbursed from the sale of the surplus lands of the reservation." To complete and maintain the work commenced by the 1910 Act, Congress has since appropriated $888,710.

we have no concern, § 9 of the Act of March 3, 1899, forbids the construction of any bridge, dam, dike or causeway over or in any port, roadstead, haven, harbor, canal, navigable river or other navigable water of the United States until the consent of Congress shall have been obtained and until the plans shall have been submitted to and approved by the Chief of Engineers and by the Secretary of War. 33 U. S. C., § 401. And § 12 makes violations of § 9 punishable by fine or imprisonment or both and provides for the removal of unauthorized structures. 33 U. S. C., § 406. These provisions unmistakably disclose definite intention on the part of Congress effectively to safeguard rivers and other navigable waters against the unauthorized erection therein of dams or other structures for any purpose whatsoever. The plaintiff maintains that the restrictions so imposed apply only to work undertaken by private parties. But no such intention is expressed, and we are of opinion that none is implied. The measures adopted for the enforcement of the prescribed rule are in general terms and purport to be applicable to all. No valid reason has been or can be suggested why they should apply to private persons and not to federal and state officers. There is no presumption that regulatory and disciplinary measures do not extend to such officers. Taken at face value the language indicates the purpose of Congress to govern conduct of its own officers and employees as well as that of others. *Donnelley* v. *United States*, 276 U. S. 505, 516. If still in force, § 9 unquestionably makes "consent of Congress" essential to the valid authorization of the Parker Dam. There has been no express repeal of that section and, as will presently appear, it is not inconsistent with subsequent legislation on which plaintiff relies.

2. Plaintiff, unable to cite any statute specifically authorizing the Secretary to construct the dam, turns to § 25 of the Act of April 21, 1904, 33 Stat. 224. That section is a part of the reclamation laws which are enacted—not under the commerce clause, Art. 1, § 8, cl. 3, but in the exertion of power granted by Art. IV, § 3, cl. 2: "The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States". *United States* v. *Hanson*, 167 Fed. 881, 883. *Kansas* v. *Colorado*, 206 U. S. 46, 88, *et seq.* The part of § 25 relied on follows: "That in carrying out any irri-

gation enterprise which may be undertaken under the provisions of the reclamation Act . . . and which may make possible and provide for, in connection with the reclamation of other lands, the reclamation of all or any portion of the irrigable lands on the Yuma and Colorado River Indian reservations in California and Arizona, *the Secretary of the Interior is hereby authorized to divert the waters of the Colorado River* and to reclaim, utilize, and dispose of any lands in said reservations which may be irrigable by such works in like manner as though the same were a part of the public domain". The immediate question is whether the italicized clause can reasonably be construed as adequate to carry the burden that plaintiff would have us lay upon it. The purpose was not to prescribe or regulate the means to be employed to divert water from the Colorado but to extend the reclamation law to the Indian reservations named. It was merely to empower the Secretary, if the circumstances stated should arise, to reclaim lands in these reservations by use of water to be taken from that river. The authority granted was no more than permission to appropriate them for the purpose specified. No dam is shown to have been necessary. Water is frequently taken from streams for the purposes of irrigation without putting dams across them. Failure specifically to authorize a dam or even approximately to fix location or to require use calculated to aid navigation makes strongly against the plaintiff.

In support of the construction for which it contends, plaintiff asserts that it was under this Act that the Secretary of the Interior built the Laguna Dam across the Colorado. But it does not appear that either riparian State objected or that the validity of his authority has ever been drawn in question. Congress has made appropriations for the benefit of the project of which it is a part[5] and so recognized and approved the building of the dam. *Wisconsin* v. *Duluth*, 96 U. S. 379, 386. There has been cited no other instance of the construction, without the consent of the Congress, of a dam across a navigable interstate river. Indeed, it is not certain that that part of the Colorado was then deemed to be navigable.[6] We find no merit in the contention that § 25 of the Act

[5] See e. g., Acts of July 1, 1916, 39 Stat. 304; June 12, 1917, 40 Stat. 148, and July 1, 1918, 40 Stat. 674, making appropriations for the Yuma Project, Arizona-California, which includes the Laguna Dam. See e. g., Reclamation Service Report 13, p. 73, *et seq.*; Report 15, p. 68, *et seq.*

[6] See Art. IV (a), Colorado River Compact.

of April 21, 1904, is the "consent of Congress" required by § 9 of the Act of March 3, 1899. And plainly without force is the suggestion that by making appropriations for irrigation of lands in Indian reservations Congress authorized this dam.

3. The clause of § 1 of the Boulder Canyon Project Act empowering the Secretary to construct a main canal connecting the Laguna Dam "or other suitable diversion dam" with the Imperial and Coachella Valleys does not authorize the building or in any respect apply to the proposed Parker Dam. The latter is about 70 miles upstream from the Laguna and the canal proposed to be built to bring water to the valleys named.[7] The contract alleged to have been made by the United States and the Metropolitan Water District, a copy of which is attached to plaintiff's brief, shows that the purpose immediately to be served by the Parker Dam is to enable the United States in fulfillment of earlier contracts to deliver waters at that place into the aqueduct of the District. And while that instrument specifies other uses to which the United States may put the waters by means of the dam, transmission by canal to either of these valleys is not mentioned. Indeed, the plaintiff does not, and it could not reasonably, claim that § 1 of the Boulder Canyon Project Act authorizes the construction of this dam. Nor does it make any contention in respect of the allegation of the bill that § 11 of the Act authorizes surveys of the Parker-Gila reclamation project.

4. Parker Dam was not approved by the President as required by § 4 of the Act of June 25, 1910, 43 U. S. C., § 413. That section declares that no irrigation project contemplated by the Reclamation Act "shall be begun unless and until the same shall have been recommended by the Secretary of the Interior and approved by the direct order of the President of the United States." The project in question rightly may be deemed to have been begun on the date, February 10, 1933, of the contract made by the United States and the Water District for the construction of the dam. There is no allegation that any project including the dam was ever recommended, submitted to or in any manner approved by the President. But plaintiff maintains that the approval required in the section has been given through executive action under the Na-

[7] Wilbur and Ely, The Hoover Dam Contracts, United States Department of the Interior, 1933, pp. II, 71, 325.

tional Industrial Recovery Act. It relies on §§ 201 a, 202 and 203 of the Act and Executive Order No. 6252. The first of these authorizes the President to delegate any of his powers under title II of the Act to such agents as he may designate. Section 202 provides that the Administrator under the direction of the President shall prepare a comprehensive program of public works "which shall include . . . construction of river and harbor improvements . . . *Provided,* That no river or harbor improvements shall be carried out unless they shall have heretofore or hereafter been adopted by the Congress or are recommended by the Chief of Engineers . . . ." Section 203 authorizes the President "through the Administrator . . . to construct . . . any public-works project included in the program prepared pursuant to section 202". The Executive Order delegates authority to the Administrator "to construct . . . any public-works project included in the program." The contract here involved was made more than four months before the passage of that Act. Plaintiff asserts that the project was included in the comprehensive program, that the Administrator commenced construction about September 10, 1934, and that on November 10 following, Arizona interfered forcibly to prevent plaintiff from doing the work. The alleged recommendation by the Chief of Engineers and approval by the Secretary of War were not made until January 5, 1935,[8] nine days before plaintiff filed its bill. These facts do not constitute approval "by direct order of the President" as required by § 4. Plaintiff does not allege or claim that the President has directly authorized the dam or specifically empowered the Administrator to include it in the comprehensive program. We find nothing in the Recovery Act that reasonably may be held to repeal the requirement of that section. It follows that the construction of the dam has not been authorized as required by the Reclamation Law.

5. Plaintiff's contention that the dam is being built under authority of the Recovery Act is without force.

The chronology just given, when taken in connection with the citations in the contract of the Acts relied on, shows the claim to

[8]The complaint does not show the date of the alleged inclusion of the dam in the comprehensive program of public works authorized by § 202 of the Recovery Act. It also fails to give the date of the recommendation of the Chief of Engineers and approval by the Secretary of War. A copy of the certificate attached to the complaint furnishes that date, January 5, 1935.

be an afterthought born of the controversy disclosed by the complaint and about to be here submitted. Section 25 of the Act of April 21, 1904, does not authorize this dam. Plaintiff does not assert that it was otherwise adopted by Congress. It therefore remains only to consider whether the dam was recommended by the Chief of Engineers within the meaning of the proviso of § 202. When the Recovery Act was passed, the phrases "adopted by the Congress" and "recommended by the Chief of Engineers", when used in Acts of Congress relating to river and harbor improvements, had well-understood and definite technical meanings. The statutes, at least in the 40 years next preceding the passage of the Recovery Act, disclose: It has been the general, if not indeed the uniform, practice of Congress specifically to authorize all river and harbor improvements carried out by the United States,[9] and to base its action upon the recommendation of the Chief of Engineers.[10] That officer makes such recommendation only after preliminary examinations followed by surveys.[11] Congress expressly

[9]The Rivers and Harbors Acts prior to that of September 22, 1922, authorized surveys and improvements and made appropriations. A typical provision was: "That the following sums . . . are hereby appropriated . . . to be expended under the direction of the Secretary of War and the supervision of the Chief of Engineers, for the construction, completion, repair, and preservation of the public works hereinafter named. . . ." Act of August 8, 1917, 40 Stat. 250. The Act of September 22, 1922, omitted appropriations and adopted specified improvements: "That the following works of improvement are hereby adopted and authorized, to be prosecuted under the direction of the Secretary of War and supervision of the Chief of Engineers in accordance with the plans recommended in the reports hereinafter designated. . . ." 42 Stat. 1038. The same language is used in § 1 of the Acts of March 3, 1925, 43 Stat. 1186; January 21, 1927, 44 Stat. 1010, and July 3, 1930, 46 Stat. 918. See also 79 Cong. Rec., p. 5454.

[10]" . . . The Committee on Rivers and Harbors has pursued an invariable rule of requiring all rivers and harbors projects to have the approval and recommendation of the Corps and Chief of Engineers before we considered them eligible for consideration." Remarks of chairman of that committee in the Committee of the Whole House considering bill for river and harbor improvements, 79 Cong. Rec., p. 5441, see also pp. 5460, 5465, 5466. Cf. § 9, Act of September 22, 1922 (33 U. S. C., § 568): "No project shall be considered by any committee of Congress with a view to its adoption, except with a view to a survey, if five years have elapsed since a report upon a survey of such project has been submitted to Congress pursuant to law".

[11]To secure greater uniformity in the recommendations and reports required of Chief of Engineers (See H. Rep. No. 795, 57th Cong., 1st session, p. 3), Congress created in his office a Board of Engineers for Rivers and Harbors, § 3, Act of June 13, 1902, 32 Stat. 372. Subsequent legislation in respect of this Board, material here, is found in § 3, Act of June 25, 1910, 36 Stat. 668; §§ 3 and 4, Act of March 4, 1913, 37 Stat. 825; § 2, June 5, 1920, 41 Stat.

directs the making of these examinations and surveys[12] and prohibits any which it has not authorized.[13]

"As a general rule, where the legislation dealing with a particular subject consists of a system of related general provisions indicative of a settled policy, new enactments of a fragmentary nature on that subject are to be taken as intended to fit into the existing system and to be carried into effect conformably to it, excepting as a different purpose is clearly shown". *United States* v. *Jefferson Electric Co.*, 291 U. S. 386, 396. In the light of that rule it is clear the general language of the Recovery Act on which plaintiff relies does not evidence intention on the part of Congress to change its well established policy. In respect of the required recommendation by the Chief of Engineers there is no inconsistency between the proviso and the statutes upon which rests the practice of his office. The Recovery Act may, and therefore it must, be read in harmony with the purposes evidenced by the provisions of the Rivers and Harbors Acts to which reference has been made. When so read the proviso requires that the recommendation of the Chief of Engineers be based on examinations, surveys and reports made in pursuance of these Acts and submitted to the Congress for its consideration when determining whether the project should

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1010; § 9, September 22, 1922, 42 Stat. 1043. 33 U. S. C., §§ 541, 542, 545, 546, 547, 568.

Preliminary examinations are first made, unless Congress expressly directs a survey and estimate, and if, upon such examination, the improvement is not thought advisable, no further action may be taken unless Congress so directs. 33 U. S. C., § 545. The subsequent detailed survey report is made by the district engineer, it is reviewed by the division engineer, by the Board of Engineers for Rivers and Harbors and finally by the Chief of Engineers who submits to Congress a report containing information of a character specified by the above statutes, together with his recommendation. As shown in footnote 10, a congressional committee may not consider a project with a view to its adoption if five years have elapsed since submission of a report on a survey. See 79 Cong. Rec., p. 5439, *et seq.* 1922 Report of Chief of Engineers, pp. 99, 100.

[12]Since September 22, 1922, the Acts authorizing preliminary examinations and surveys employ the following language: "The Secretary of War is hereby authorized and directed to cause preliminary examinations and surveys to be made at the following-named localities. . . ." § 12, 42 Stat. 1043.

[13]"That no preliminary examination, survey, project, or estimate for new works other than those designated in this or some prior Act or joint resolution shall be made". § 12, Act of September 22, 1922, 42 Stat. 1043. Typical language in the Acts appropriating for rivers and harbors is: "That no funds shall be expended for any preliminary examination, survey, project, or estimate not authorized by law." It is found, for example, in the Act of April 26, 1934, 48 Stat. 639-640, making appropriations for the fiscal year ending June 30, 1935.

be undertaken. The only change effected by the Recovery Act is that the improvement may be made if either "adopted by the Congress" or "recommended by the Chief of Engineers" whereas the prior practice required not only recommendation by the Chief of Engineers but also adoption by Congress; that is, the Recovery Act amounts merely to the adoption of projects that have been heretofore or hereafter may be recommended to Congress by the Chief of Engineers under the established practice.[14]

In accordance with definite policy long pursued by it, the Congress has committed to the Secretary of War and Chief of Engineers all investigations, surveys and work in aid of navigation. The Recovery Act discloses no intention to require that the Chief of Engineers' recommendations in respect of proposed improvements shall be made to the Administrator instead of to the Congress. The provisions of the Act brought forward by plaintiff make no such change. Plainly they are not sufficient to empower the Administrator to initiate preliminary examinations and surveys or to determine whether the Parker Dam or any work in aid of navigation shall be undertaken.

It is not shown that Congress ever directed a preliminary examination or survey by the Chief of Engineers of any project that includes this dam. This is a condition precedent to the recommendation required by the proviso. Failure to allege compliance warrants the conclusion that the recommendation relied upon lacks the support of examination and survey by army officers and review by the board of engineer officers required by law.

6. As the complaint fails to show that the construction of the dam is authorized, there is no ground for the granting of an injunction against the State, and therefore the complaint must be dismissed.

It is so ordered.

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[14]When the Recovery Act was enacted, Congress had before it the report of the Chief of Engineers for the fiscal year ended June 30, 1932. This report disclosed (p. 3) that 954 projects authorized by Congress were in force, that active operations were in progress upon 261 (p. 4), that reports on 242 preliminary examinations and surveys had been transmitted to Congress during the past fiscal year (p. 6), and that the Chief of Engineers had under consideration 302 investigations authorized by river and harbor and flood control acts. (p. 22.)